

When New Governance Fails

DOUGLAS NEJAIME*

New Governance scholars have responded to critiques of rights-based, state-centered, top-down strategies by turning toward flexible, collaborative public-private partnerships and by locating lawyers as problem solvers rather than as traditional advocates. Intervening in a variety of substantive fields, these scholars often position New Governance as an ambitious project that seeks to usher in a new paradigm of public problem solving. This Article pulls back on the enthusiastic embrace of New Governance, instead situating it as a contingent model of cause lawyering that complements, rather than replaces, previous advocacy models, including rights-claiming litigation. To do so, this Article draws out professional and representational objections to New Governance. First, New Governance scholars often neglect cause lawyers, treat lawyers like other institutional actors, or provide insufficiently concrete lawyer roles. Accordingly, lawyers might resist New Governance practice based on their professional identities. Next, the process-oriented focus of New Governance theory poses representational issues for lawyers working on behalf of marginalized constituents. New Governance process might merely reinscribe existing power dynamics and render challenges to outcomes more difficult. As a counterbalance to the overabundance of success stories in the New Governance literature, this Article locates these professional and representational objections in accounts of New Governance failure drawn from the identity-based domains of sexual orientation, gender, and religion. These stories of New Governance failure reveal challenges facing New Governance theory and begin to expose conditions conducive to New Governance practice. At the same time, they suggest the continued relevance of rights-claiming, court-centered strategies.

* Sears Law Teaching Fellow, The Williams Institute, UCLA School of Law; Associate Professor, Loyola Law School (Los Angeles) (beginning Summer 2009). J.D., Harvard Law School, A.B., Brown University. I am indebted to the Williams Institute for supporting my research. For their helpful comments, I would like to thank Rick Abel, Susan Carle, Amy Cohen, Scott Cummings, David Cruz, Grainne de Burca, Lani Guinier, Janet Halley, Joel Handler, Nan Hunter, Orly Lobel, Jennifer Mnookin, Melissa Murray, Shaun Paisley, Nancy Polikoff, Darcy Pottle, Russell Robinson, Susan Sturm, Louise Trubek, Eugene Volokh, and all those in attendance when I presented this project at the Williams Institute Works-in-Progress Spring 2008 Series. For providing invaluable research material, I am also grateful to Rachel Baird, Dr. Dana Beyer, Dr. Charles Haynes, Wayne Jacobsen, and Michael Kavey, as well as the librarians at UCLA's Hugh & Hazel Darling Law Library (and especially Lee Ann Fullington). I appreciate the careful work of the editors of the *Ohio State Law Journal*, especially Lauren Hilsheimer.

I. INTRODUCTION

In the last few decades, many scholars and practitioners have turned away from rights-claiming strategies. Scholars from Critical Legal Studies,¹ Feminist Legal Theory,² Critical Race Theory,³ Queer Theory,⁴ and Cause Lawyering⁵ have leveled compelling critiques of rights discourse. These criticisms range from theoretical critiques—pointing out the essentializing⁶ and political nature of rights⁷—to effectiveness critiques—contending that public interest lawyers seduced by the “myth of rights” might hinder social movement mobilization and place unreasonable faith in the power of courts to remedy inequalities.⁸

Most recently, scholars have constructed a role for lawyers that responds to critiques of rights-based, state-centered, top-down litigative and regulatory strategies by turning toward experimental, flexible, collaborative public-

¹ See, e.g., Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363–64 (1983).

² See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 391–92, 400–01 (1984); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644–45, 658 (1983).

³ See Devon Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1468–72 (2000); Kimberly Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

⁴ See Michael Warner, *THE TROUBLE WITH NORMAL 1* (1999).

⁵ See Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 302 (Austin Sarat & Stuart A. Scheingold eds., 2006) (explaining that cause lawyering scholarship “largely calls into question the viability of legal rights strategies as a vehicle for social reform, emphasizing the demobilizing effect of law on political action”) [hereinafter Cummings, *Mobilization Lawyering*]; Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? 76, 77 (Bryant G. Garth & Austin Sarat eds., 1998).

⁶ See, e.g., Carbado, *supra* note 3, at 1469.

⁷ See, e.g., Kennedy, *supra* note 1, at 178–79.

⁸ STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 13–22 (1974). See *What Cause Lawyers Do For, and To, Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1, 6–7 (Austin Sarat & Stuart A. Scheingold eds., 2006). Most recently, Scott Cummings made the distinction between “political” and “efficacy” critiques of rights discourse. See Cummings, *Mobilization Lawyering*, *supra* note 5, at 307.

private partnerships and by locating lawyers as problem solvers rather than as traditional advocates.⁹ This scholarship has increasingly been labeled New Governance¹⁰ and includes strands termed democratic experimentalism, network governance, collaborative governance, associative democracy, negotiated governance, and legal pragmatism.¹¹

While meaningful distinctions exist among the various brands of New Governance, significant unifying themes have emerged. New Governance scholars recognize recent trends of privatization and decentralization and seek to reconfigure them as locations for innovation in law and policy. They situate local stakeholders as key governance participants and position fair process as a way for various actors—public and private, large and small, groups and individuals, lawyers and non-lawyers, experts and lay citizens, conservatives and progressives—to collectively imagine, implement, monitor, and revise policy. In this depiction, courts do not declare and enforce substantive mandates from above but rather facilitate regimes that allow for localized, collaborative implementation of agreed-upon legal norms. Lawyers, then, do not formulate interests in terms of hard-and-fast rights subject to win-lose litigation. Rather, they work alongside other stakeholders to articulate interests and integrate them within a regime that relies on participatory process to yield win-win solutions. As New Governance scholars imagine new roles for lawyers as collaborators,

⁹ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–50 (2004).

¹⁰ There is lively and considerable debate about the commonalities among these various projects as well as the terminology used to describe these alternative governance efforts, and accordingly, the appropriateness of an all-encompassing term to capture these potentially disparate strands. Nonetheless, I use the term not only for the sake of convenience but also to suggest that there is an emerging coherence in this body of scholarship. Compare *id.* at 344, with Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004) [hereinafter Karkkainen, “New Governance” in *Legal Thought*].

¹¹ See Karkkainen, “New Governance” in *Legal Thought*, *supra* note 10, at 472; Lobel, *The Renew Deal*, *supra* note 9, at 346–47; see also Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 323, 328 (Grainne de Burca & Joanne Scott eds., 2006) [hereinafter Sturm, *Gender Equity Regimes*]; William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 173–75 (2004) [hereinafter Simon, *Solving Problems vs. Claiming Rights*]; Helen Hershkoff & Benedict Kingsbury, *Crisis, Community, and Courts in Network Governance*, 28 N.Y.U. REV. L. & SOC. CHANGE 319, 321–24 (2003); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283–84 (1998).

facilitators, and problem solvers, they forge a new model of cause lawyering, seeking to mobilize lawyers as participants in reconfigured reform projects.¹²

Many scholars position New Governance as a totalizing, ambitious framework, seeking to usher in a new regime for addressing public problems. Orly Lobel, for instance, argues that in “an analytical tour de force . . . contemporary legal thought and practice are pointing to the emergence of a new paradigm—*governance*.”¹³ New Governance thought has generally looked to address the full panoply of public issues, intervening extensively in numerous regulatory projects, including environmental regulation,¹⁴ occupational safety,¹⁵ labor law,¹⁶ healthcare,¹⁷ education,¹⁸ and employment.¹⁹ In line with its far-reaching agenda, New Governance scholarship generally has focused on success stories. Most such stories fail

¹² By cause lawyering, I mean lawyering with the purpose of effecting social change. See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, in CAUSE LAWYERING 1, 4 (Austin Sarat & Stuart Scheingold eds., 1998) (“Cause lawyering . . . is frequently directed at altering some aspect of the social, economic, and political status quo.”).

¹³ Lobel, *The Renew Deal*, *supra* note 9, at 343–44.

¹⁴ See, e.g., Bradley C. Karkkainen, *Adaptive Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 943–45 (2003); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555, 555 (2002); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 259–63 (2001); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 545–49 (2000); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 3–8 (1997).

¹⁵ See, e.g., Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1072–77 (2005).

¹⁶ See, e.g., Orly Lobel, *Public Policy Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146, 2146–47 (2003).

¹⁷ See, e.g., Nan Hunter, *Public-Private Health: New Directions in Public Health Law*, 10 J. HEALTH CARE L. & POL’Y 89, 89–92 (2007); Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575, 575–76 (2002).

¹⁸ See, e.g., Charles F. Sabel & William H. Simon, *Destablization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1027 (2004); James Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 184 (2003); Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC’Y 73, 73–76 (2001).

¹⁹ See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–65 (2001) [hereinafter Sturm, *A Structural Approach*].

to contemplate the conditions necessary for New Governance interventions and the unique circumstances that pose challenges to such interventions.

This Article explores the challenges facing a New Governance model and, in doing so, pulls back on the wholehearted embrace of New Governance and the move away from state-centered strategies to suggest thinking about how this emerging model might inform traditional cause lawyering and public problem solving without ushering in a paradigm shift. Instead of presenting an all-or-nothing picture of traditional court-centered activism and New Governance, a close examination situates New Governance as a contextual and contingent model of cause lawyering. Moreover, such an examination demonstrates the continued relevance of rights-claiming strategies.

This Article takes a critical view of New Governance scholarship and practice. In doing so, it is not my intention to discount the significance of this scholarship or the important benefits it has provided in numerous substantive domains. Rather, by illuminating the conditions under which New Governance might fail to operate effectively, I hope to position New Governance as a contingent model of cause lawyering that complements, rather than replaces, other (and specifically litigation-focused) models. While some commentators have urged scholars “not [to] get carried away with a giddy sense . . . that the state is passé,”²⁰ and have warned that it is too simplistic to claim that state-centered regulation is bound to fail,²¹ comprehensive examples of New Governance failure are rare, and no one has yet to articulate the conditions necessary for New Governance success. This Article will hopefully open a dialogue to begin to specify the types of situations consistent with New Governance commitments.

I use the role of lawyers (and law more generally) to interrogate New Governance thought, and my analysis specifically draws on examples from identity-based contexts. With its ever-expanding scope, New Governance has begun to reach identity-based projects such as gender and race anti-discrimination regimes. Grainne de Burca explores the ways in which traditional human rights advocates must adapt to new forms of governance

²⁰ Adam Crawford, *Networked Governance and the Post-Regulatory State? Steering, Rowing and Anchoring the Provision of Policing and Security*, 10 THEORETICAL CRIMINOL. 449, 458 (2006) (internal quotations omitted).

²¹ See Steven Croley, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 102 (2008); Scott Burris, Michael Kempa, & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 62 (2008); Michael Moran, *Review Article: Understanding the Regulatory State*, 32 BRIT. J. POL. SCI. 391, 395–96 (2002).

driving large-scale race discrimination reforms in the European Union.²² Susan Sturm uses the lens of New Governance to contemplate strategies that counter gender and race inequalities in the workplace.²³ Because Sturm offers the most extensive New Governance thinking in a domestic identity-based context, her work is central to my analysis.²⁴ Attention to identity-based domains in New Governance scholarship offers my critique a necessary coherence since identity-based projects often have hewed to classic court-centered models in the tradition of civil rights litigation. Identity-based work frequently features social movement lawyers who have successfully used litigation to represent a fairly stable, identifiable group of constituents. Accordingly, this context allows me to set up an opposition between a litigation-focused cause lawyering model, which draws on court-centered, publicly-articulated rights claims, and New Governance, which stresses a turn away from this model.

For purposes of this Article, I present both the New Governance and litigation models in highly stylized forms. Of course, neither is as monolithic as this picture suggests. Moreover, the line between them blurs. Cause lawyers draw on a range of advocacy models and intervene in a variety of settings; a lawyer may engage in what I describe as New Governance practice at the same time that she pursues a court-centered strategy. Nonetheless, the fairly stable distinction I draw between the two models tracks much of the New Governance literature at the same time that it facilitates an exploration of the very real differences between them. Indeed, other scholars have begun to observe this dichotomy. In his review of a collection of New Governance essays, Jason Solomon argues that New Governance “presents, directly and indirectly, a critique of and (for some) an intentional challenge to the rights-based model of legal liberalism.”²⁵ Specifically referring to the identity-based domains I take up, Solomon notes

²² See Grainne de Burca, *EU Race Discrimination Law: A Hybrid Model?*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 11, at 97 [hereinafter De Burca, *EU Race Discrimination Law*].

²³ See Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 248–54 (2006) [hereinafter Sturm, *The Architecture of Inclusion*]; Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 278–84 (2002) [hereinafter Sturm, *Workplace Equity*]; Sturm, *A Structural Approach*, *supra* note 19, at 519–20.

²⁴ Moreover, perhaps because she is charting new territory, Sturm recognizes the potentially conditional nature of New Governance and in that sense shares many of the impulses motivating my project.

²⁵ Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 827 (2008).

that “[f]or progressives seeking to strengthen norms like antidiscrimination, the road to success is not by ‘claiming rights,’ as in a traditional regulatory model, but by ‘solving problems,’ as in new governance.”²⁶

By resituating New Governance as a complementary model of cause lawyering, I am claiming that lawyers representing identity-based groups have many reasons to adhere to a rights-claiming litigation model instead of wholeheartedly moving to a New Governance model. At the same time, though, I am suggesting ways to make New Governance more profitable through a better understanding of the conditions conducive to its use. I recognize New Governance as an effective strategy in some contexts and appreciate the way in which Sturm and De Burca have brought to light some of these situations in identity-based domains. I seek, however, to understand the contingency of New Governance practice by examining where and why New Governance breaks down.

This Article proceeds in three parts. Part II provides a synthesis of New Governance thought. First, I set out guiding theoretical principles, including collaborative process, stakeholder participation, local experimentation, public/private partnership, and flexibility. Next, I position lawyers as problem solvers rather than as traditional advocates in a New Governance cause lawyering model. Then I point to domains for New Governance intervention, devoting special attention to public education and employment—two institutional settings with particular resonance in identity-based contexts. Finally, I show the way in which New Governance often presents itself as a totalizing public interest law model rather than as a complement to other frameworks.

Part III offers a critique of New Governance thought as it is currently constituted. This Part draws out, from a lawyering perspective, what I term professional and representational objections to New Governance. First, I seize on the lack of cause lawyer roles in the new model. I point out how the New Governance framework often neglects the distinct roles of lawyers. Scholars either treat lawyers like other institutional actors or provide insufficiently concrete lawyer roles which fail to resonate with many public interest cause lawyers. Next, I flip perspectives, moving from a focus on how New Governance eschews cause lawyers to how cause lawyers might eschew New Governance. Here I focus on the way in which the process-based focus

²⁶ *Id.*; cf. William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy*, 17 CAN. J. LAW & JURIS. 101, 124 (2004) (arguing that in the democratic experimentalist vision, “powerful legislatures and the rule of law are typically depicted as nothing more than moldy leftovers from a bygone liberal past” such that “[i]nsufficient attention is paid to their normative achievements”).

of New Governance theory might pose representational issues for lawyers whose constituents are left to a process lacking substantive commitments. I argue that New Governance process might merely reinscribe existing power dynamics and render challenges to outcomes more difficult.

Part IV offers three examples of New Governance failure in identity-based contexts.²⁷ Two of these New Governance interventions have emerged recently in the public school domain and implicate sexual orientation- and religion-based projects. In 2006, the non-partisan First Amendment Center published a guide that urges schools to use New Governance tools to reach common ground on issues of sexual orientation and religion. Not one legal organization has signed on to or endorsed the guide. In 2006 and 2007, after contentious litigation surrounding a sex education curriculum in Montgomery County, Maryland, the community attempted a New Governance strategy, using stakeholder participation to revise the curriculum in a collaborative process. The curriculum and the parties returned to litigation. The third example derives from the employment context and implicates a gender-based project. The now-dissolved law firm of Heller Ehrman LLP sought to address the under-representation of women in partnership through the Opt-In Project, which purported to include stakeholders and offer solutions. Heller's effort, however, produced little change on the ground and largely ignored the unique situation of women of color.

II. NEW GOVERNANCE

In the current political climate, and in light of high-profile rights-based campaigns stalling in the courts, litigation, for some liberals and progressives, has become passé at best and suspect at worst.²⁸ Many scholars

²⁷ In terms of methodology, my analysis draws on court decisions, legal briefs, media accounts, public documents from community-based committees, roundtable discussions, conferences, public agency proceedings, bar associations, and boards of education, and organization literature, including press releases and legal memoranda. I have also conducted interviews of relevant individuals, including the primary drafters of the First Amendment Center's guide and representatives from the American Civil Liberties Union (ACLU), Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal, and Alliance Defense Fund (ADF). Despite my efforts, I was not able to speak with many of the groups and individuals implicated by these New Governance strategies, and therefore my analysis attempts to construct an accurate picture from the materials available to me.

²⁸ See Cummings, *Mobilization Lawyering*, *supra* note 5, at 305 (explaining how a conservative federal judiciary, inefficient federal agencies, and cutbacks in legal services funding "foreclosed legal advocacy opportunities for liberal public interest

and practitioners are turning away in a more wholesale fashion from classic litigation strategies. New Governance scholars are the latest in this cadre to articulate an alternative vision to top-down, court-centered, rights-based legalism. This Part sets up New Governance as a model of cause lawyering. First, I explicate theoretical principles guiding New Governance thought. Then I position lawyers in New Governance settings before pointing to significant New Governance institutional domains. Finally, I comment on the scope of New Governance scholarship.

A. Principles

New Governance scholarship reflects an increasingly institutionalized turn by lawyers and scholars toward collaborative, negotiative governance models that destabilize the priority of traditional litigation and recast lawyers in explicitly problem-solving terms. New Governance has had the most profound influence on projects that stem from administrative practice. Traditionally, a centralized agency is charged with implementing articulated state policy while citizens (and non-governmental organizations [NGOs] purporting to serve their interests) are left to contest, through the administrative system and the courts, the agency's implementation and enforcement efforts. Rather than accept this conventional model (and the increasingly conservative results of state-centered regulation), New Governance scholars and practitioners have taken advantage of the blurred boundary between public and private regulation to identify opportunities for more collaborative problem solving that empowers stakeholders, including individuals and NGOs. These scholars have seized on the ways in which traditionally state-centered, top-down regulatory projects are detaching from a centralized state apparatus and devolving from the command-and-control regime of public law litigation.²⁹

organizations" in the last part of the twentieth century); Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law"*, 52 UCLA L. REV. 1223, 1266–67 (2005) ("While liberal public interest law groups may have been optimistic about what they could achieve through the courts in the 1960s and 1970s, they have since become less invested in affirmative litigation strategies.").

²⁹ See Grainne de Burca & Joanne Scott, *Introduction to LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 11, at 1–2 [hereinafter De Burca & Scott, *Introduction*] ("[T]he common features which have been identified involve a shift in emphasis away from command-and-control in favour of 'regulatory' approaches which are less rigid, less prescriptive, less committed to uniform outcomes, and less hierarchical in nature."); see also Sabel & Simon, *supra* note 18, at 1021 (describing, in public law litigation, "a growing and promising shift from command-and-control to experimentalist intervention"). Abram Chayes used the term "public law litigation" to describe cases in

New Governance scholarship places primacy on (1) collaborative process, (2) stakeholder participation, (3) local experimentation, (4) public/private partnership, and (5) flexible policy formation, implementation, and monitoring. I will address each guiding principle before locating lawyers in New Governance regimes. Because New Governance terminology tends toward ambiguity, I will ground these principles in examples from New Governance scholarship.

First, New Governance emphasizes a deliberative process with acknowledged, agreed-upon norms. Fair process is trusted to produce beneficial substantive results upon which stakeholders agree. As Carrie Menkel-Meadow has observed about process-orientated theories, fairness becomes a way for stakeholders to approve of outcomes.³⁰ New Governance thought posits that stakeholder negotiation, based on agreed-upon process norms, may overcome the mere re-articulation of entrenched positions and instead yield a problem-solving practice in which interests are unstable and may converge.³¹ This up-front emphasis on the potential for solutions constitutes a process norm that is expected to translate into substantive results. As William Simon explains, “[s]triving for consensus, even when unsuccessful, expresses respect for all stakeholders and puts pressure on the parties to try to understand each other and search for mutually beneficial solutions.”³²

Scholars trust a consensus-building process to defuse adversarial interactions. In thinking about Legal Pragmatism, a brand of New Governance, Simon explains that its more traditional public law predecessor, Legal Liberalism, “implied that the plaintiff was a victim because it treated the defendant as a villain and discrimination was seen as conscious and

which “the object of litigation is the vindication of constitutional or statutory policies.” Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

³⁰ Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 353–54 (2004); see also Sturm, *Gender Equity Regimes*, *supra* note 11, at 330 (“outsider participation can provide legitimacy to new governance regimes by giving those affected by decisions a voice in determining how those problems will be addressed”).

³¹ See Lobel, *The Renew Deal*, *supra* note 9, at 396 (“conflicting parties . . . come together in multistakeholder negotiations, moving away from, at least tentatively, entrenched positions about each party's particular interests”); Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 179 (“If the process is properly designed, neither the individual nor the community can know what their interests are before entering it. Each party's conception of her own goals may change in the course of the process because each may learn things in the process about the possibilities for realizing them.”).

³² Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 182.

malicious wrongdoing.”³³ As Simon points out, though, many forms of discrimination result from indifference or ignorance, rather than from intent.³⁴ Therefore, to the extent that the classic model of Legal Liberalism “excessively moralizes the issues and engenders self-righteousness on the part of the plaintiffs or defensiveness on the part of the defendants, it can be counterproductive.”³⁵ Under Simon’s view, contested issues present “opportunities for learning through mutual engagement.”³⁶

Archon Fung’s work on local school governance in Chicago provides an illustration of this New Governance focus on process as the key to opening up potential substantive agreement and defusing volatile interactions. Fung explains that a poor inner-city school district suffered “paralyzing conflicts” among parents, teachers, and the principal.³⁷ Extremely poor student test performance provoked an exchange of blame among the various parties. But Fung shows how the Local School Council, which included the school principal, teachers, parents, and community members, “transcended their histories of conflict.”³⁸ Interested parties “began to behave cordially to one another and, more important, to deliberate about substantive school improvement issues rather than using meetings as occasions for political maneuvering.”³⁹ The Council ultimately developed a corrective action plan to allocate funds for school improvement that would work toward providing a better educational environment.⁴⁰

Next, New Governance makes stakeholder participation a central tenet. Participatory process recognizes diverse stakeholders in public problems and attempts to give those stakeholders a voice in policy formation. The emphasis on stakeholder participation is perhaps best exemplified by Simon’s idea of associative democracy, which stresses that “citizens should participate in the design and implementation of the policies that affect them.”⁴¹ While stakeholder participation may take multiple forms, institutions, including public agencies, private firms, and NGOs, assume primary roles in facilitating participation.⁴² In participatory governance,

³³ *Id.* at 205.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Fung, *supra* note 18, at 95.

³⁸ *Id.* at 96.

³⁹ *Id.*

⁴⁰ See *id.*

⁴¹ Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 175.

⁴² See *id.*

stakeholders, including organizations, interact, share responsibility, and together generate policy.⁴³

In this regard, Orly Lobel's work on occupational safety is paradigmatic. Lobel explains how a public agency like OSHA "bring[s] together various stakeholders to create an ongoing learning environment."⁴⁴ For instance, the Strategic Partnership Program, which mainly focuses on construction industry hazards, creates partnerships by including employers, employees, employee representatives, and educational institutions.⁴⁵ Together these stakeholders collaborate on workable solutions for dealing with industry hazards. Rather than declare mandates from above, the public agency facilitates collaborative problem solving.

Next, New Governance scholarship eschews centralized federal regulation in favor of decentralized local authority. Indeed, the focus on stakeholder participation relates to New Governance's emphasis on localism. In Lobel's words, "[t]hose closest to the problem possess the best information leading toward a potential solution."⁴⁶ States and localities are expected to be better situated to facilitate participatory processes, and once solutions are found, they are best suited to monitor implementation.⁴⁷

For example, in environmental regulation, Bradley Karkkainen uses the concept of "regulatory penalty defaults" to show how federal regimes can compel action by state and local actors.⁴⁸ In watershed management, for instance, the total maximum daily load (TMDL) program under the Clinton administration, which threatened harsh federal regulation, incentivized state and municipal governments to construct proactive, locally tailored clean water programs.⁴⁹ Even more localized decision making emerges in Archon Fung's community policing case study. Fung notes how a collaborative process brought together various interests closest to the problem—police, local residents, NGOs (such as the Chicago Alliance for Neighborhood Safety), and public actors (such as the mayor's office)—such that those

⁴³ See Lobel, *The Renew Deal*, *supra* note 9, at 377.

⁴⁴ Orly Lobel, *Governing Occupational Safety in the United States*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 11, at 269, 277.

⁴⁵ See *id.*

⁴⁶ Lobel, *The Renew Deal*, *supra* note 9, at 382.

⁴⁷ See *id.* at 381–82.

⁴⁸ See Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 *FLA. ST. U. L. REV.* 861, 865–66 (2006).

⁴⁹ *Id.* at 890–92.

affected by policing practices at the municipal level all had a voice in the articulation of new policy.⁵⁰

Next, New Governance stresses public/private partnerships. Public problems are not entrusted merely to public agencies, but instead private interests affected by public action involve themselves in policy formation. In this sense, New Governance places the focus on “the relationships among private and public actors rather than on the substantive prescription of state legislation, rules, and judicial decisions.”⁵¹ This public-private rethinking attempts to harness the late-twentieth century turn toward private firms and markets to provide what had otherwise been public services.⁵² The increased interdependence between public and private actors blurs previously stable boundaries between them.⁵³

Louise Trubek’s work in the healthcare context provides an illustration. Trubek points to the emergence of managed care as a New Governance phenomenon.⁵⁴ In response to employer dissatisfaction with rising healthcare costs, private organizations began to offer packages of healthcare services at fixed prices.⁵⁵ These organizations were subject to regulation by a variety of agencies.⁵⁶ As consumer dissatisfaction surfaced, NGOs sprung up to act as consumer advocates, working both with managed-care organizations themselves and with state regulatory agencies, to represent consumer interests as employers and regulators negotiated with private organizations.⁵⁷

⁵⁰ Fung, *supra* note 18, at 74, 78.

⁵¹ Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 505 (2004) [hereinafter Lobel, *Setting the Agenda*]; see also Lobel, *The Renew Deal*, *supra* note 9, at 377 (“[T]he regulatory model promotes adversarial relations, mutual distrust, and conflict. In contrast, under the governance model, individuals are norm-generating subjects. They are involved in the process of developing the norms of behavior and changing them.”).

⁵² See Lobel, *The Renew Deal*, *supra* note 9, at 373–74 (“In the last several decades, a range of policies has attempted to increase the participation of nongovernmental individuals and groups in public processes. New groups demand more access to policy processes and a role in governing social institutions. Multiparty involvement is understood as a way of creating norms, cultivating reform, and managing new market realities.”).

⁵³ See *id.* at 374 (“Sharing tasks and responsibilities with the private sector creates more interdependence between government and the market. In turn, increased participation leads to fluid and permeable boundaries between private and public.”).

⁵⁴ Trubek, *supra* note 17, at 588.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 590.

Finally, New Governance scholarship stresses the importance of flexibility in policy formation and implementation. The policy produced by the collaborative process does not represent a final articulation but rather a step along the way as stakeholders consistently review the effectiveness of current policy and make revisions accordingly.⁵⁸ Such flexibility is facilitated by the decentralized, local focus of New Governance practice and the potential for private actors to monitor and revise public policy efficiently.

William Simon's innovative work on the Toyota manufacturing system illustrates this feature. Simon explains how several specific norms govern the manufacturing process. When a situation arises in which it is impossible to follow the relevant norms, the manufacturing process is suspended (rather than allowing employees to act with discretion). Norms are evaluated in light of the problem, revised to reflect the new information, and implemented in their new form.⁵⁹

This discussion makes clear that the vocabulary of New Governance in many ways mirrors the flexibility that New Governance practice embraces. It is difficult to extract concrete principles that guide New Governance thought, or at least to give those principles adequate meaning. Nonetheless, with the theoretical positions and paradigmatic examples just set out, a clearer picture emerges by acknowledging what New Governance is not.

New Governance distinguishes itself from mere informal negotiated policymaking by deliberately constructing a process that is inclusive, making that process transparent, and imbuing the outcomes of the process with flexibility by consistently engaging in reflection and revision. In this sense, there is a deliberateness about New Governance process that marks a departure from informal political, democratic, or majoritarian decision making.⁶⁰

At the same time, New Governance also distinguishes itself from informal justice regimes, such as mediation, alternative dispute resolution (ADR), and arbitration. New Governance moves away from the isolated

⁵⁸ See Lobel, *The Renew Deal*, *supra* note 9, at 396 ("The new model is better positioned to accept uncertainty and diversity, advancing iteratively toward workable solutions."); Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 176 (explaining the focus on "a more decentralized and flexible mode of policy implementation").

⁵⁹ See generally William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 11, at 37; Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 191.

⁶⁰ Cf. Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 175 (explaining that New Governance practice relies on citizen representation through NGOs rather than "spontaneous unorganized citizen action").

resolution of specific legal disputes and moves toward the creation of a framework that addresses systemic governance issues.⁶¹ While informal justice mechanisms are backward-looking to the extent that they attempt to remedy past wrongs, New Governance is forward-looking, resisting the temptation to focus on past injuries and instead advocating a system that may govern prospective relations in a flexible way. Nonetheless, there is significant overlap between the guiding principles and motivations of New Governance and informal justice, including the emphases on fair process, defusing adversarial relations, and finding common ground.⁶² And New Governance process seems subject to criticisms about power that scholars leveled against informal justice regimes years earlier.⁶³

B. Positioning Lawyers

Many of the regimes to which New Governance scholars have pointed involve issues that implicate the public interest. Lawyers working on these issues can surely be thought of as cause lawyers. In fact, New Governance scholars attuned to lawyering theory stress New Governance as an emerging model of public interest law.⁶⁴ Even Lobel, in her compelling synthesis of New Governance thought, locates New Governance within the historical trajectory of cause lawyering.⁶⁵

New Governance situates lawyers working on public issues as problem solvers, imagining lawyers functioning not in traditional, adversarial, litigative roles but instead as collaborators, negotiators, facilitators, and organizers.⁶⁶ The lawyer role is more flexible and less professionalized than in a litigation model. Lawyers, like the other stakeholders with whom they

⁶¹ Cf. Sturm, *A Structural Approach*, *supra* note 19, at 539 (pointing to “the limitations of individualistic processes that are defined by legal claims and resolved through after-the-fact enforcement”).

⁶² For an excellent analysis of the ties between New Governance and negotiation, see Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008).

⁶³ For critiques of informal justice systems, see THE POLITICS OF INFORMAL JUSTICE (Richard L. Abel ed., vol. 1, 1982).

⁶⁴ See generally Trubek, *supra* note 17.

⁶⁵ Lobel, *The Renew Deal*, *supra* note 9, at 447; see also Cummings, *Mobilization Lawyering*, *supra* note 5, at 305 (situating the movement toward stakeholder participation and public-private partnerships within cause lawyering thought).

⁶⁶ See, e.g., Sturm, *Workplace Equity*, *supra* note 23, at 320–21; Trubek, *supra* note 17, at 587.

work, participate in a collaborative policymaking process without an authoritative voice or expert role.⁶⁷

In this way, New Governance positions lawyers at least partially outside of traditional litigation. Instead of hewing to a model of Legal Liberalism, which emphasizes rights claims and a turn to the judiciary, New Governance locates law within less adversarial domains,⁶⁸ turning away from the win-lose scenarios of adversarial legalism and instead turning toward the possibilities for win-win solutions through collaboration.⁶⁹ As New Governance scholar Louise Trubek explains in the healthcare context, “[t]raditional lawyer roles, such as litigation and presenting testimony before regulatory agencies, appear to be under-emphasized.”⁷⁰ Rather, lawyers “engage in nontraditional activities,” including facilitation, performance monitoring, and data gathering.⁷¹ In sum, New Governance thought moves the lawyer from a specialized, expert role with operations in the legal (and often judicial) domain to a more collaborative role with operations in a variety of practice settings and institutional domains.⁷²

C. Domains

While New Governance principles find their roots in administrative and regulatory legal projects, scholars have applied them in an array of substantive domains, including employment, occupational safety, environmental regulation, community policing, education, corporate

⁶⁷ See Sturm, *Workplace Equity*, *supra* note 23, at 298 (“Lawyers are important, although they are by no means the exclusive intermediaries for operating across disciplinary and institutional boundaries. Along with other intermediaries, they play the role of mediating between principle and practice, judiciary and organization, symbols and realities, and normative aspirations and organizational practices.”).

⁶⁸ See Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 198 (“Conventional litigation practice [is] . . . unsuited to Pragmatist problem solving.”). This is not to say that attempts at alternative governance will not lead to litigation in various circumstances. For instance, Cary Coglianese has shown that negotiated rulemaking at the federal administrative level, which is a New Governance phenomenon, has actually led to a greater percentage of legal challenges to agency rules than standard rulemaking. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1307–17 (1997).

⁶⁹ See Lobel, *The Renew Deal*, *supra* note 9, at 379 (“A shift from adversarial legalism to collaboration entails a move from an image of win-lose situations to a win-win environment.”).

⁷⁰ Trubek, *supra* note 17, at 600.

⁷¹ *Id.*

⁷² See Lobel, *The Renew Deal*, *supra* note 9, at 406.

governance, community lawyering, anti-discrimination, constitutionalism, and healthcare.

New Governance scholars devote particular attention to institutional domains in which legal pronouncements require implementation and oversight and where decision makers with discretion give meaning to legal norms.⁷³ For example, the public education system and the workplace, two paradigmatic New Governance domains, resonate with New Governance's concerns about implementation and monitoring that prompted its turn away from public law litigation.⁷⁴ For example, the path from a court's pronouncement of a non-harassment or non-discrimination right for a student to a school's creation and implementation of policy reflective of that right can be littered with discretionary minefields. Similarly, a worker's right to be free from sexual harassment might lose meaning as her employer fails to comprehensively understand sexual harassment, to adequately educate employees, and to police the workplace. The New Governance emphasis on local policy formation, implementation, and monitoring seeks to remove barriers to realizing legal norms.

Moreover, the institutional focus of New Governance recognizes the way in which subtle forms of bias, which may not result from discriminatory intent and may not resonate with straightforward anti-discrimination law, create structural barriers to participation for marginalized groups. For instance, female employees' rights to be free from sex discrimination may not encompass, in the eyes of employers or courts, the types of institutionalized bias that create structural barriers to women's promotion. A stakeholder process that includes private firms attempts to change the institutional features that perpetuate subordination and under-participation.

Susan Sturm's paradigmatic project—the representation of women faculty in science departments at the University of Michigan—provides an illustration that draws on both public education and the workplace as sites for New Governance practice. Her project expertly demonstrates how

⁷³ See *id.* at 444 (“At the implementation and enforcement stages, interest group resistance and bureaucratic limits can defeat the goals of the regulatory efforts. Government agencies often lack the resources to monitor implementation”); Simon, *Solving Problems v. Claiming Rights*, *supra* note 11, at 171 (critiquing Legal Liberalism in relation to the new collaborative governance regime, Simon explains that “[d]istrust of the lower-tier public workforce inclines Legal Liberalism toward rules, but because the rule maker never has enough time or information to anticipate every contingency, or to monitor compliance, the worker retains substantial discretion”).

⁷⁴ Including school desegregation and employment discrimination cases as paradigmatic examples of public law litigation, Abram Chayes explains that such litigation requires “the judge’s continuing involvement in administration and implementation.” See Chayes, *supra* note 29, at 1284.

concerns with institutional impediments to policy implementation, oversight, and achievement animate New Governance work.

Moving away from traditional, court-centered public interest law, Sturm argues that workplace equality requires pushing past the anti-discrimination model that has characterized plaintiffs' litigation over the past few decades.⁷⁵ Sturm's concern with second-generation discrimination, which often results from institutional and subtle forms of bias, leads her to question the efficacy of rights-claiming litigation.⁷⁶ Specifically in the university setting, Sturm argues that lawsuits have failed to yield adequate enforcement and equality as faculty members are reluctant to sue their university employers and often fail when they do so, struggling to make the necessary statistical showings to prove systemic disparate treatment or disparate impact under Title VII.⁷⁷

Indeed, in this latest case study, Sturm displays even less attachment to court-grounded reforms than she did in her earlier New Governance work, in which she anchored employment anti-discrimination and diversity reforms in jurisprudential norms and frameworks.⁷⁸ Critiques of her earlier approach to second-generation employment discrimination stressed that problem solving induced by judge-made rules may produce merely symbolic efforts toward compliance and that courts might be reluctant or unable to hold employers accountable for implementing effective problem-solving methods.⁷⁹ Sturm responds to these critiques in her latest offering by moving away from court-induced problem solving, instead focusing on how public institutions other than courts construct systems of governance that provide accountability and produce results.⁸⁰ According to Sturm, "[i]nstead of relying on the direct threat of judicial sanctions, institutional intermediaries use their ongoing capacity-building role within a particular occupational sector to build

⁷⁵ Sturm, *The Architecture of Inclusion*, *supra* note 23, at 253.

⁷⁶ *Id.* at 248.

⁷⁷ *Id.* at 263–64.

⁷⁸ Compare Sturm, *The Architecture of Inclusion*, *supra* note 23, with Sturm, *A Structural Approach*, *supra* note 19.

⁷⁹ See, e.g., Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003).

⁸⁰ Sturm, *The Architecture of Inclusion*, *supra* note 23, at 254. Samuel Bagenstos echoes this move in his analysis of the structural approach to anti-discrimination law. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 4 (2006) ("today's problems of workplace bias may lie beyond the reach of not just doctrinal tools but also the normative resources of antidiscrimination law").

knowledge . . . , introduce incentives . . . , and provide accountability”⁸¹ Sturm’s trajectory shows how New Governance interventions might be more or less law-centered.

In her latest case study, Sturm looks at the example of the ADVANCE program of the National Science Foundation (NSF) at the University of Michigan. She explains that ADVANCE “uses public agency resources to promote women’s advancement through institutional transformation at the university level, to develop public knowledge about effective strategies for institutional change, and to increase incentives for universities to use that knowledge to advance women in science.”⁸² The NSF awards institutional transformation grants to support experimental approaches to reducing barriers to the advancement of women. Program proposals must undertake institutional transformation, commit to data-based decision making, state the conceptual framework for the project, show the infrastructure necessary to implement the plan, commit to ongoing monitoring and assessment, and plan for comparative analysis that allows for the sharing of best practices.⁸³

The University of Michigan’s plan included initiatives aimed at four goals: (1) recruiting more women scientists and engineers, (2) retaining women by increasing the likelihood that women thrive at Michigan, (3) fostering a work environment supportive of women, and (4) encouraging women’s career development.⁸⁴ A working group of race and gender experts, NGO representatives, and administrators was assigned to each goal area.⁸⁵ Framers developed an integrated strategy, which included faculty career advising, networks supporting women scientists and engineers, departmental transformation grants and self studies, and task forces producing policy change.⁸⁶ Strategies and Tactics Recruiting to Improve Diversity and Excellence (STRIDE), a central component of the Michigan effort, constituted a faculty committee charged with improving the hiring of women scientists by using peer education.⁸⁷

The Michigan ADVANCE program began in 2002, and Sturm reported indicators of success by 2005.⁸⁸ More women occupied faculty and

⁸¹ Sturm, *The Architecture of Inclusion*, *supra* note 23, at 251.

⁸² *Id.* at 271.

⁸³ *Id.* at 277–79.

⁸⁴ *Id.* at 285.

⁸⁵ *Id.*

⁸⁶ *Id.* at 285.

⁸⁷ Sturm, *The Architecture of Inclusion*, *supra* note 23, at 258.

⁸⁸ *Id.* at 286.

leadership positions, and women reported an improved work environment.⁸⁹ Under Sturm's measures, ADVANCE is a success. The representation of women in Michigan's science and medical departments increased from thirteen percent in 2001 to thirty-nine percent in 2004.⁹⁰ An NSF review panel reported "an increase in the number of departments moving from 'token' representation of women (defined as less than eighteen percent of tenure track faculty) to 'minority' representation (eighteen to thirty-six percent)."⁹¹

Sturm devotes limited attention to the location of lawyers in the ADVANCE program. She explains that lawyers redefined their roles as more "constitutional," meaning these lawyers helped the university "establish processes and governance systems that are accountable and principled in the way they pursue inclusiveness."⁹² In addition, lawyers working specifically on issues of race and gender helped "to design and disseminate successful initiatives as policy."⁹³ Although Sturm provides little concrete description of the lawyers' activities, she concludes that these lawyer roles "avoid some of the pitfalls constraining law's effectiveness under more traditional anti-discrimination and affirmative action approaches."⁹⁴

D. *A Paradigm Shift?*

While New Governance represents a principled project based on strong normative commitments, there is certainly an instrumental element to this scholarship, which has emerged largely from progressives. New Governance thought does not signal a turn away from otherwise successful top-down, state-centered strategies. Rather, New Governance strategies spring from a discontent with the results produced by traditional techniques.⁹⁵ Indeed, Sturm's move away from "the pitfalls constraining law's effectiveness" in the anti-discrimination domain evidences this impulse.

⁸⁹ *Id.*

⁹⁰ *Id.* at 253.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Sturm, *The Architecture of Inclusion*, *supra* note 23, at 253.

⁹⁴ *Id.*

⁹⁵ Scott Cummings documents this phenomenon in the anti-sweatshop movement in the Los Angeles garment industry, explaining that a turn to stakeholder collaboration was taken up "not out of an ideological commitment to its methodology, but a practical recognition of the barriers to other approaches." See Scott L. Cummings, *Hemmed In: Law in the Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. (forthcoming 2009) (manuscript on file with author).

Social movement scholars have for a long time recognized the inadequacies of traditional legal reform projects. For instance, in his seminal text on social movements and their relationship to law, Joel Handler pointed to ways in which straightforward legal tactics fail.⁹⁶ In noting the problematic nature of agency-controlled hearings and the lack of meaningful participation by disempowered groups, Handler located, some two decades earlier, the structural inadequacies upon which New Governance would eventually act.⁹⁷ As court-centered social reform projects came to see their progressive ends stalled by increasingly unsympathetic bureaucracies and conservative federal judges, progressive scholars began to turn to new ways to harness the power of law for the benefit of traditionally disempowered groups.⁹⁸ With the substantive goals animating state-centered approaches to law moving further out of reach, scholars predictably turned to alternative projects to produce desired results.⁹⁹

Furthermore, while New Governance positions itself mainly as a project of the Left, there is little inherently progressive about it, and many of its strategies and principles seem decidedly centrist.¹⁰⁰ Indeed, New Governance is in some ways a coming-to-terms with the conservative turn of the state in the last several decades. In fact, New Governance resonates with neo-liberalism; the impulse toward less centralized regulation and an appeal to privatization reflects neo-liberal ideals which have enjoyed currency in the American post-welfare state.¹⁰¹ Those coming from more politically

⁹⁶ JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 148 (1978).

⁹⁷ *See id.*

⁹⁸ *See* Lobel, *Setting the Agenda*, *supra* note 51, at 502 (“The importance of New Governance scholarship is the growing consensus among progressive legal scholars that the regulatory state is no longer . . . fulfilling the promise of just and equitable democracy.”); *see also* Karkkainen, “*New Governance*” in *Legal Thought*, *supra* note 10, at 483 (“For some, the empirical observation that conventional regulatory mechanisms either are not working or are approaching the limits of their effectiveness is enough to justify, on purely instrumental grounds, the turn to a more open and collaborative style of decision making . . .”).

⁹⁹ *See* Burris *et al.*, *supra* note 21, at 12.

¹⁰⁰ *See* Lobel, *The Renew Deal*, *supra* note 9, at 459 (“governance need not be a clear-cut left or right ideological project”).

¹⁰¹ *See* Burris *et al.*, *supra* note 21, at 20 (“The public-private partnership has been an emblematic device in neo-liberal systems of governance that see the state attempting to govern at-a-distance by harnessing the ordering capacity of markets and other autonomous local orders.”); *see also id.* at 48 (linking New Governance themes of “subsidiarity” and “the partnership between state and non-state actors” to “neo-liberal approaches to the reinvention of government”); Scheuerman, *supra* note 26, at 125 (“Although the proponents of democratic experimentalism possess impressive

conservative perspectives might have little reason to resist New Governance process on purely political grounds, thus giving advocates a way to devise governance systems that seek to bring about progressive change through centrist means.

In this sense, New Governance at least partly represents an instrumental project, which is an important insight for evaluating the continued relevance of traditional, state-centered, top-down litigation in some public interest domains. Given the instrumental element of New Governance strategies, it is somewhat surprising that many leading scholars position New Governance as a potentially totalizing project rather than as part of an ever-expanding lawyering repertoire.¹⁰²

Orly Lobel, in synthesizing New Governance scholarship, locates the collaborative governance movement as a new way to explain an array of processes in diverse substantive domains.¹⁰³ While Lobel acknowledges the

progressive credentials, it is nonetheless striking that little is said about the uglier facets of a system of capitalism organized according to the principles of benchmarking, concomitant engineering, and independent monitoring.”).

¹⁰² Some scholars have articulated a hybrid model, which “acknowledges the co-existence and engagement of law and new governance, and explores different ways of securing their fruitful interaction.” See De Burca & Scott, *Introduction*, *supra* note 29, at 6. Rather than models stressing a gap between law and New Governance or positioning New Governance as transforming law, the hybridity thesis posits law and New Governance as interdependent. See *id.* at 4–10. The hybrid model, however, looks at New Governance and law in the same moment and in the same regime. As De Burca explains, the hybrid model is “not a twin-track approach, with a new governance strategy providing an alternative option should the legal approach fail to achieve its desired results . . . rather[,] the different approaches are yoked together in a single and increasingly integrated framework.” De Burca, *EU Race Discrimination Law*, *supra* note 22, at 119. While the impulse behind the hybrid model might eventually suggest the need for an integrated lawyering model that draws on both traditional strategies and more recent innovations, many important New Governance scholars reject the hybridity thesis, instead advancing what have been described as the gap and transformation models of New Governance. In the gap model, New Governance turns away from the shortcomings of law and constructs its own, alternative regime. In the transformation model, New Governance actually acts on law in a transformative way, “suggest[ing] that the basic premises and normative presuppositions of law, legal form and legal function need to be rethought in the light of changing social practices in general, and more specific changes within public law in particular.” De Burca & Scott, *Introduction*, *supra* note 29, at 10.

¹⁰³ See Lobel, *The Renew Deal*, *supra* note 9, at 443 (“The governance model should thus be understood as an attempt to envision a third way between state-based, top-down regulation and a single-minded reliance on market-based norms; between centralized command-and-control regulation and individual free contract. It aims to transcend the conceptual dichotomies of regulation and deregulation; of legal directive and spontaneous market behavior. Inventing flexible, responsive administrative practices

successes of traditional legal claims and state-centered strategies,¹⁰⁴ she nonetheless positions New Governance as an ambitious, expansive project that, in dealing with the new realities of privatization and decentralization, “views traditional patterns of hierarchical top-down regulatory control as obsolete.”¹⁰⁵ As Bradley Karkkainen remarks, her synthesis signals that “something big is afoot.”¹⁰⁶

In a similar vein, Charles Sabel and William Simon, in their epilogue to Grainne de Burca and Joanne Scott’s New Governance compilation, take what they call a “transformation” view, claiming that “new governance is not just a part of law, but its bright future.”¹⁰⁷ They argue that “[m]odern jurisprudence casts an enormous shadow of doubt over the stronger claims of traditional legality,” and they assert that “history gives no reason to think that traditional legal institutions could perform the tasks of insuring accountability and protecting rights in a world of rapid technological and organisational change”¹⁰⁸ Sabel and Simon see the case studies provided by New Governance scholars—the success stories so common in New Governance scholarship—as suggestive of a new paradigm rather than “the co-existence of old and new.”¹⁰⁹ Indeed, Sabel and Simon usher in the age of New Governance with strong rhetoric:

[G]reat innovations only arise in conditions that undermine their antecedents. The hope of innovation that only augments but otherwise does not alter our existing capacities is certainly a more harmless fable of social engineering than the idea of a deliberate and all encompassing revolution, but is no less a fable, and no less informed than its revolutionary cousin by the idea of a knowing social apex or centre.¹¹⁰

may be the only alternative to big, blunt bureaucracies on the one hand, and private market mechanisms on the other.”)

¹⁰⁴ See *id.* at 452–53.

¹⁰⁵ *Id.* at 377; see also *id.* at 344 (describing “a paradigm shift from a regulatory to a governance model, signifying a collective intellectual and programmatic project for a new legal regime”).

¹⁰⁶ Karkkainen, “New Governance” in *Legal Thought*, *supra* note 10, at 478.

¹⁰⁷ Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty* to LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 11, at 396. The “transformation” view is discussed *supra* note 102.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Documenting the ambitious agenda of New Governance scholars, Scott Burris, Michael Kempa, and Clifford Shearing canvass the field and note the way in which New Governance is rapidly expanding to every substantive domain. As they explain, “[n]o domain of public policy has been excluded” from this new regulatory project.¹¹¹ New Governance scholars “have in common a full acceptance of the picture of polycentric, distributed governance” such that “they tend to start from scratch” in devising effective governance strategies.¹¹² Indeed, the plethora of success stories—and the lack of accounts of failure—underscores the scope and outlook of New Governance scholarship. As Jason Solomon comments in his review of De Burca and Scott’s New Governance compilation, “Together, the essays form a mosaic that is largely, if not unequivocally, bright,” leading one to conclude, “the more new governance, the better.”¹¹³

Susan Sturm, who specifically brings New Governance to identity-based issues, represents an important exception to this trend.¹¹⁴ Sturm acknowledges that a tentative posture might “fail[] to build the infrastructure to engage in the form of public problem solving necessary to address complex problems,” and she admits that “regulatory ambitiousness has elevated the visibility, impact, and stature of new governance.”¹¹⁵ At the same time, though, Sturm urges more careful attention to the conditions that facilitate successful New Governance practice—to what she calls “the ‘how’ and the ‘where’ of new governance.”¹¹⁶ She recognizes that while use of New Governance techniques as a strategic response to a particular situation might be uncontroversial, New Governance presents itself as “an overarching regulatory theory,” which begs difficult questions about desirability and feasibility.¹¹⁷

In suggesting directions for future work, Sturm urges New Governance scholars to focus on the conditions necessary for effective public problem

¹¹¹ See Burris *et al.*, *supra* note 21, at 20.

¹¹² *Id.* at 53. Simon notes that New Governance scholars “seem reluctant to specify limits to the applicability of their approach, and they tend to be ambitious.” See Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 174.

¹¹³ Solomon, *supra* note 25, at 826.

¹¹⁴ See *id.* (“Susan Sturm’s essay on efforts to help women advance in science and engineering careers in higher education is perhaps the most cautious and domain specific of these case studies and, in part as a result, among the most compelling.”).

¹¹⁵ Sturm, *Gender Equity Regimes*, *supra* note 11, at 360, 324.

¹¹⁶ *Id.*; see also Solomon, *supra* note 25, at 833 (“Going forward, the new governance scholarship would do well to focus more on the conditions for success . . .”).

¹¹⁷ Sturm, *Gender Equity Regimes*, *supra* note 11, at 360, 323.

solving and to think through “the relationships between new governance and more traditional approaches.”¹¹⁸ To this end, she encourages additional accounts of New Governance success on the ground, explaining that “[t]he process of identifying experiments that institutionalise ongoing learning and change provides a small but significant response to the most sceptical of the new governance critics.”¹¹⁹

But examples of failure, as much as examples of success, allow for “a critical assessment of whether and when new governance operates as intended.”¹²⁰ In other words, I seek to take cues from Sturm’s call for contextual case studies of New Governance success and instead conduct contextual case studies of New Governance failure. Placed alongside New Governance scholarship that reveals conditions conducive to successful implementation, my analysis will suggest challenges that New Governance must face as it expands its reach. Significantly, my account will also highlight the continued relevance and desirability of traditional rights-claiming strategies. In his recent review of De Burca and Scott’s New Governance volume, Solomon argues that “a more nuanced account of how new governance schemes both arise and play out ‘on the ground’ in the culture of adversarial legalism will help strengthen the theory’s explanatory power.”¹²¹ By focusing on the relationship of New Governance interventions to adversarial litigation strategies and traditional lawyer roles, my analysis seeks to offer such an account.

III. THE PROBLEMATIC APPLICATION OF NEW GOVERNANCE

As New Governance scholars and practitioners begin to expand their reach, especially into identity-based contexts, they will likely find cause lawyers committed to advocacy on behalf of constituents. Such constituents in turn look to cause lawyers for expertise and zealous representation of their interests. New Governance scholars, however, have yet to articulate roles that meaningfully include these lawyers in collaborative governance interventions. Instead, New Governance process excludes many cause lawyers, treats them like other actors, or articulates a cause lawyer role that is insufficiently concrete and that fails to resonate with the work of these

¹¹⁸ *Id.* at 324. Indeed, as Solomon wonders, perhaps “the success of new governance depends in part on the old, hoary topic of the law of remedies.” Solomon, *supra* note 25, at 834. That is, perhaps litigation and enforcement mechanisms are necessary for successful New Governance practice.

¹¹⁹ Sturm, *Gender Equity Regimes*, *supra* note 11, at 325.

¹²⁰ *Id.*

¹²¹ Solomon, *supra* note 25, at 821.

lawyers. This positioning of lawyers by New Governance scholars yields what I term “professional objections” to New Governance practice, which affect the uptake, implementation, and ultimate success of New Governance.

In addition, lawyers might see currently available New Governance processes, in certain circumstances, as detrimental to the interests they represent. Purportedly participatory processes may in some instances merely reinscribe existing power dynamics, leaving outsider interests on the outside. Moreover, contesting outcomes becomes more difficult when such outcomes carry the presumption of community endorsement. This second set of concerns constitutes what I term “representational objections.”

This Part identifies and explains the professional and representational objections that present obstacles to New Governance implementation. The two sets of objections are intimately connected and together present a compelling basis on which cause lawyers in identity-based contexts might resist New Governance interventions.

A. Professional Objections

Even though New Governance presents itself as a new model for public interest advocacy, much New Governance scholarship neglects the role of lawyers, or, more precisely, fails to distinguish lawyers from other institutional actors. When it does articulate roles for lawyers *qua* lawyers, such roles are insufficiently concrete.

1. Excluding Lawyers, or Excluding Lawyers qua Lawyers

First, lawyers—and particularly traditional public interest lawyers—are often peripheral to New Governance practice. Susan Sturm’s ADVANCE analysis provides a useful example. Sturm contends that concerns about lawyer status and interest group representation “seem inapposite” in her New Governance case study, since “lawyers acting on behalf of excluded groups are largely absent from the institutional change process.”¹²² Indeed, when Susan Carle responds to the ADVANCE case study by pointing to the underdeveloped lawyer roles, Sturm replies that Carle makes “lawyers much more central than they actually were to ADVANCE or than they necessarily should be.”¹²³

¹²² Susan Sturm, *Conclusion to Responses—The Architecture of Inclusion: Interdisciplinary Insights of Pursuing Institutional Citizenship*, 30 HARV. J. L. & GENDER 409, 424 (2007) [hereinafter Sturm, *Conclusion to Responses*].

¹²³ *Id.*

Next, New Governance scholarship theorizes lawyer positions as detached from distinct lawyer roles and instead tied to more general New Governance roles. That is, the lack of emphasis on professional identity and legal expertise leads to a lawyer position often indistinguishable from the roles of other institutional actors. In the ADVANCE case study, for instance, lawyers act as “institutional intermediaries” but “are by no means the exclusive intermediaries for operating across disciplinary and institutional boundaries.”¹²⁴ Even Louise Trubek, who continues to see lawyers as central to New Governance in the healthcare domain, contends that “[t]he lawyer has moved from the role of an adversary in the legislature, courts, and agencies to a collaborator engaged in a series of alliances to develop and implement policy.”¹²⁵ While lawyers in Trubek’s model “provide the knowledge of how public and private institution’s [sic] function, reassure the consumers that their voices will be heard, and speak out when there are malfunctions[,] . . . they do not do it alone; they are part of a multi-faceted approach.”¹²⁶ Even when lawyers’ professional identity is valued, such identity is indistinguishable from that of other collaborators. For instance, Lobel notes that “diverse professionals—including lawyers, doctors, social workers, and educators—collaborate to address . . . broad issues.”¹²⁷ Lawyers do not occupy specialized roles. Instead, they function primarily as collaborators—a role that at times seems fungible.

Given New Governance’s breadth and its far-reaching aspirations, public interest lawyers seem essential to the successful uptake of New Governance innovations and vital to the representation of groups traditionally excluded from participatory process. While Sturm argues that “[l]awyers representing excluded groups must figure out what their role is when litigation does not drive an institutional change process,”¹²⁸ I contend that New Governance scholars must also work toward articulating new, or at least reinvented, roles for these lawyers. Indeed, Sturm seems to overlook the key role that lawyers may (and must) continue to play if New Governance is to become an overarching public problem-solving regime. The expectation that lawyers will figure out their new roles on their own—or, worse yet, the belief that it does not matter if they fail to do so—attempts to build a new paradigm of public interest law without those most instrumental to the prominence of the previous paradigm.

¹²⁴ Sturm, *Workplace Equity*, *supra* note 23, at 298.

¹²⁵ Trubek, *supra* note 17, at 586.

¹²⁶ *Id.* at 600–01.

¹²⁷ Lobel, *The Renew Deal*, *supra* note 9, at 387.

¹²⁸ Sturm, *Conclusion to Responses*, *supra* note 122, at 424.

New Governance scholarship's lack of explicit lawyering roles, and its concomitant move away from adversarial legalism, poses an initial problem of uptake by cause lawyers whose professional identities are grounded in court-centered activism. Cause lawyers have related reasons, based on their identities as lawyers, to resist current articulations of New Governance process: (1) the maintenance of professional identity, (2) a market interest in legal conflict, (3) the preservation of litigation options, and (4) the centrality of legal norms.

First, cause lawyers representing social movements may resist a process that marginalizes their professional status and assigns them a peripheral role in what is in essence a public interest law project. Such a process threatens the careers many cause lawyers have worked to build and casts their specialized skill set as largely irrelevant. Indeed, New Governance may even approach this skill set, which is characterized by court-centered, adversarial advocacy, with suspicion. Cause lawyers might wonder whether in submitting to New Governance regimes, they are complicit in their own career suicide.

Second, cause lawyers engaged in public interest litigation stake their livelihood on legal conflict. Joel Handler explains that public interest lawyers "create and define problems, which serve the needs of the firm as well as the social-reform group."¹²⁹ Not only do they advance movement goals, but the lawyers also "gain from the publicity."¹³⁰ Moreover, well-publicized litigation campaigns help fundraising efforts, and professional social movement lawyers rely on such fundraising to survive. Accordingly, cause lawyers have self-interested reasons to resist New Governance processes. The move away from high-profile litigation threatens the prominence and financial security of cause lawyers who have made careers out of litigation.¹³¹

Third, the move toward a comprehensive non-litigation model might undermine selected attempts at litigation and thereby affect a cause lawyer's ability to fill a litigation-centered role. I am not suggesting that public interest lawyers do not engage in non-litigation techniques; in fact, most use litigation as just one tool among many. Rather, I am arguing that an upfront commitment to a New Governance non-litigation process might compromise the lawyer's ability to turn toward litigation later. That is, the deliberateness and formality of New Governance as non-litigation might make a turn

¹²⁹ HANDLER, *supra* note 96, at 31.

¹³⁰ *Id.*

¹³¹ *Cf.* Solomon, *supra* note 25, at 850 (noting in the private law context that "[l]awyers will also need to be reassured that it is in their economic interest to support (or at least not oppose) new governance").

toward litigation seem hypocritical and might paint the lawyer and the movement she represents in an unfavorable light. In effect, the same impulse that drives some New Governance practice—a turn away from adversarialism—may make uptake by lawyers who want at least to preserve adversarial options more challenging.

Finally, New Governance models seek to move away from law-centered strategies, instead casting norms as flexible and revisable. Hard legal rules and decrees do not reflect a New Governance ethic. Cause lawyers might resist collaborative regimes that are insufficiently law-centered to the extent that such regimes do not resonate with professional lawyering roles. Without elaboration of legal principles, cause lawyers might see New Governance process as a non-legal strategy that marginalizes the role of law and lawyers both to the detriment of their movements and to their own professional self-interest.

Furthermore, the lack of a law-based focus might only reinforce the desire to push litigation as a way to secure favorable doctrinal baselines that would inform any such process. Even New Governance scholars admit that background legal norms inevitably shape and inform collaborative process. Cause lawyers engaged in litigation campaigns may see room to expand upon a particular constituency's rights. With stronger rights recognition, the New Governance process might look materially different. In this sense, cause lawyers might have a temporally contingent resistance to New Governance practice.

2. *Role Ambiguity and Discounting Strengths*

Even as some New Governance accounts deemphasize the significance of lawyers, others recognize the important roles that lawyers might play in New Governance practice. In the healthcare context, for instance, Louise Trubek argues that while “the roles and skills of the public interest lawyer must evolve to adapt to the changes in governance, the public interest lawyer will remain a key player in this new scheme.”¹³² Unfortunately, though, scholars' attempts to articulate explicit lawyer roles have been vague and fail to resonate with many cause lawyers.

For instance, in her account of a structural approach in employment discrimination, Susan Sturm discusses “problem-solving lawyers,” explaining their roles as “catalysts, poolers of information, and sources of accountability.”¹³³ Likewise, in describing “lawyers as public problem solvers” in her ADVANCE case study, Sturm articulates their roles as

¹³² See Trubek, *supra* note 17, at 576.

¹³³ Sturm, *A Structural Approach*, *supra* note 19, at 527.

“intermediaries, problem solvers, institutional designers, and information entrepreneurs.”¹³⁴ But in both accounts her analysis does little to concretize these roles, instead leaving lawyers to use their own visions to understand these concepts, or, more likely, reject such roles as incomplete, unstable, and in tension with their own understandings of lawyering.

Furthermore, when scholars articulate lawyer roles, they pay scant attention to public lawyers. For instance, Trubek notes that lawyers working in New Governance regimes are not found, as with conventional public interest law practice, in non-profit law firms. Instead, she points to lawyers in a variety of settings, arguing that “lawyers’ workplace has shifted.”¹³⁵ In line with New Governance’s shift toward privatized, market-based solutions, Trubek explains that, in the healthcare context, lawyers working within managed-care organizations are key advocates in the New Governance regime.¹³⁶ Similarly, when addressing lawyers in her work on race and gender discrimination in employment, Sturm largely neglects the types of public lawyers often associated with such issues, instead focusing on private practitioners, in-house counsel, and university lawyers.¹³⁷

When Sturm addresses public interest lawyers at NGOs, she focuses on lawyers who already take a generally suspicious view of litigation. For instance, her study of workplace equity regimes includes the National Employment Law Project (NELP) in an attempt to situate “advocacy organizations as mediating institutions;” NELP, though, “embraces a structural approach to problems of low-wage and immigrant workers, . . . defin[ing] its role in relation to problems, projects, and constituencies, rather than in relation to cases, dockets, or lawyers’ fields of expertise or practice.”¹³⁸ While one could imagine that a regime tackling race and gender discrimination might include lawyers from organizations like the NAACP, Legal Momentum, and the ACLU, no such lawyers are included. Instead, we are left with no indication of the possibilities offered by these new strategies when they eventually come to depend on buy-in, at least to some degree, from cause lawyers working in these fields.

In a direct response to Sturm’s ADVANCE case study, Susan Carle articulates the most pointed critique to date of the lawyer’s role in New Governance models, explaining that New Governance scholarship has been

¹³⁴ Sturm, *The Architecture of Inclusion*, *supra* note 23, at 331–32.

¹³⁵ Trubek, *supra* note 17, at 598.

¹³⁶ *See id.*

¹³⁷ *See generally* Sturm, *A Structural Approach*, *supra* note 19; Sturm, *Workplace Equity*, *supra* note 23.

¹³⁸ Sturm, *Workplace Equity*, *supra* note 23, at 317.

vague about how exactly lawyers reconcile new facilitative and problem-solving roles with their ethical and professional responsibilities to clients.¹³⁹ Carle notes that scholars in the collaborative governance movement take the normative position that “lawyers should adopt a more independent, justice-seeking stance vis-à-vis their clients’ interests, rather than following the traditional model which emphasizes lawyers’ client-centered, zealous advocacy role.”¹⁴⁰ She advises that “[f]uture work examining the intersection of new institutional change paradigms and lawyering theory must explore these issues concerning ‘interest representation.’”¹⁴¹ Carle’s critique suggests that when New Governance actually seeks to define lawyer roles, it does so in ways that reject lawyers’ familiar roles and strengths, which largely center on zealous representation.

Of course, a new model of cause lawyering logically calls for new models of cause lawyers, but New Governance scholarship largely has missed opportunities to articulate such new roles in ways that nonetheless integrate proven strengths of public interest lawyers. Such lawyers, who drive a substantial portion of the action relating to identity-based issues (like sexual orientation, religion, race, and gender) and who excel at court-centered advocacy on behalf of identity-based group “clients,” can hardly be expected to abandon their movement members to a process that might merely reinscribe power differentials without the checks offered by zealous advocacy and clear representation. This is not to say that an articulated role for such lawyers will find them rushing from the courtroom to the conference room, but it does suggest a challenge that collaborative process models must face when entering domains saturated with litigation-savvy cause lawyers.

In constructing a process that in significant ways requires uptake by cause lawyers as it seeks to supplant a traditional litigation model, New Governance scholars miss important opportunities to concretize lawyer roles in service of New Governance process. In an attempt to take Carle’s critique in a more prescriptive direction, I will point to two specific instances of these missed opportunities.

¹³⁹ See Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J. L. & GENDER 323, 337–38 (2007) (in assessing Sturm’s study of the University of Michigan’s ADVANCE program, Carle admits that she was “left with many unanswered questions about how lawyers should perform [problem-solving] roles” and notes that from Sturm’s study “[w]e do not get a great deal of detail about these lawyers”).

¹⁴⁰ *Id.* at 340.

¹⁴¹ *Id.* at 338.

First, Sturm contemplates the possibilities for grassroots participation in new collaborative processes, admitting that “New governance scholarship is at best vague about the processes for developing outsiders’ capacity to engage effectively and thus participate as ‘equals’ in the deliberative process.”¹⁴² Sturm expresses hope that scholars and practitioners can construct processes that “enable meaningful participation by disempowered groups, and that do not simply privilege experts,”¹⁴³ and warns that without attention to this concern, involvement by grassroots organizations will be “limited to the relatively rare situations where outsiders have already organized sufficiently to engage in effective collective action.”¹⁴⁴

I contend that positioning traditional public interest lawyers in these new collaborative processes may offer a way to mobilize legal professionals for grassroots organizing purposes. Remaining cognizant of the pointed critiques of lawyers as organizers, we might nonetheless think of social movement lawyers as having the resources and know-how to identify and mobilize significant community interests.¹⁴⁵ After all, these lawyers are in the business of publicly giving voice to the grievances of marginalized communities.

Furthermore, cause lawyering scholarship suggests that New Governance scholars should approach the idea of “free-agent” lawyers with caution. The amorphous, free-agent lawyer role articulated by some New Governance scholars poses significant problems for the representational ethics and duties of cause lawyers. Expressing concern about “uncoupling lawyers’ work from the interests or perspectives of particular clients,” Carle connects her fear of a free-agent lawyer to the fear other scholars have articulated about representation of a diverse group by a single organization or lawyer.¹⁴⁶ She explains that “[l]awyers may not simply impute interests to client classes without . . . consultative outreach, lest we return to the old ‘lawyer knows best’ models that legal ethicists have toiled so hard to displace.”¹⁴⁷ Here, Carle makes a key move, pointing to the lessons that New

¹⁴² Sturm, *The Architecture of Inclusion*, *supra* note 23, at 269.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ William Simon notes that “participatory engagement . . . may be a burden to some,” explaining that “the need to articulate your views to strangers and to do so in the form of publicly acceptable reasons may be oppressive and alienating.” Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 175. Cause lawyers, accustomed to representing disempowered groups, might help to articulate views for those entering the process as outsiders.

¹⁴⁶ Carle, *supra* note 139, at 341–42.

¹⁴⁷ *Id.* at 342.

Governance scholars can learn from critical lawyering and poverty lawyering scholarship.¹⁴⁸ In this sense, Carle notes that “attention to a client’s perspective serves an important disciplinary function, especially for lawyers engaged in broad-scale institutional reform.”¹⁴⁹ Therefore, merely placing cause lawyers in collaborative processes will not necessarily ensure representation of the purported outsider group. Rather, a more client-centered approach would see cause lawyers facilitate sustained outsider participation rather than function as a proxy for such interests. In this way, thinking about representational ethics, which is key to the work of many social movement lawyers, would compel New Governance scholars to work toward a model that considers outsiders’ views in meaningful, sustainable ways and that enlists cause lawyers in this endeavor.¹⁵⁰

Next, New Governance has an uneasy relationship with the idea of expertise, recognizing the importance of expert knowledge but including within that notion a range of information on public problems from a variety of professionals and non-professionals. Indeed, this idea ties to the lack of role specificity that New Governance scholars offer lawyers. Such scholars minimize a lawyer’s claim to expertise and professional status at the same time that they emphasize information gathering.¹⁵¹ For instance, in the

¹⁴⁸ See *id.* (“It thus seems to me that the literature on lawyering that is developing as part of new governance scholarship should take heed of the lessons learned from the many decades of literature that followed Derrick Bell’s important Article, *Serving Two Masters*.”).

¹⁴⁹ *Id.*

¹⁵⁰ At the same time, this client-centered approach is tempered by critical assessments of social movement lawyers, which question the authenticity and stability of the concept of the “client group.” This scholarship urges lawyers to contemplate their constitutive power, seeing the ways in which they might, through their representation, actually constitute the group in a particular way. See Janet E. Halley, “Like Race” Arguments, in *WHAT’S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY* 40, 46 (Judith Butler et al. eds., 2000) (arguing that lawyers can “make up people” and “alter the social definition of the group itself”). Public interest lawyers representing social movements might imagine a community of constituents that matches the lawyers’ own vision for the movement rather than a vision that reflects the diverse individuals that actually comprise the group. See Anthony V. Alfieri, *(Un)covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 835 (2008) (“For critical theorists, client or group identity is neither natural nor necessary. Rather, it is constructed by advocacy, adjudication, and regulation.”). This made-up client community might very well exclude real individuals, further marginalizing members of an already marginalized community.

¹⁵¹ See Lobel, *The Renew Deal*, *supra* note 9, at 373 (explaining that in turning away from a focus on trained, expert legal professionals, New Governance “diversifies the types of expertise and experience that . . . new actors bring to the table”).

healthcare context, Trubek comments that “[c]ollaborations among stakeholders and experts serve two purposes: the exchange of information and expert knowledge and the pooling of this information to create new techniques and systems.”¹⁵² Positioning the public interest lawyer in such collaborations, Trubek explains that “[t]he lawyer is no longer considered a social engineer with magical knowledge who can redesign anything using her own expertise.”¹⁵³ She connects this realization not only to a “general reduction in the power of expertise” but also to increased “skepticism regarding the exclusiveness of lawyer expertise and the public’s willingness to use other non-traditional sources of authority.”¹⁵⁴

I want to urge New Governance scholars to resituate legal expertise as an important form of knowledge, even if just one form among many, in a way that suggests a continued (even if limited) professionalized, expert role for lawyers in deliberative processes. Lawyers’ expertise and mastery of the legal norms that serve as the backdrop to collaborative problem solving may infuse process with some substantive baselines, which are perhaps necessary to convince stakeholders to come to the table. If traditionally disempowered groups and individuals could count on cause lawyers to articulate baseline legal rights and to educate participants about legal norms, such groups and individuals might have more confidence that New Governance process will account for their interests in a meaningful way. In this sense, lawyer expertise may actually facilitate the citizen participation that New Governance values and the outsider inclusion that New Governance requires.

B. Representational Objections

Aside from concerns about professional identity and role definition, cause lawyers might have strategic and ethical reasons related to client representation for resisting New Governance process in select situations. Such lawyers might fear that a process that purports to include marginalized stakeholders and work toward win-win solutions might instead reinscribe existing power dynamics to the detriment of the client group. This concern is heightened in situations lacking strong shared substantive commitments. In the end, such a process might produce results that would otherwise exist in its absence, and yet the appearance of stakeholder collaboration might make the outcomes more difficult to contest and thereby further complicate the task of the committed cause lawyer.

¹⁵² Trubek, *supra* note 17, at 586.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

1. *Trusting Substance to Process*

New Governance scholarship focuses on process norms as a way to engage diverse stakeholders in collaborative deliberation and thereby yield substantive results. This faith in process, discussed Part II.A., *supra*, assumes that interest groups' positions are unstable. As Orly Lobel explains, "[i]n a collaborative environment, the capacities as well as the identities of the participants evolve substantially over time."¹⁵⁵ Echoing this notion of changing positions and interests, William Simon contends that,

[i]f the process is properly designed, neither the individual nor the community can know what their interests are before entering it. Each party's conception of her own goals may change in the course of the process because each may learn things in the process about the possibilities for realizing them.¹⁵⁶

Yet much of the collaborative governance scholarship has been applied in situations where some shared ground and commitments exist rather than those featuring diametrically opposed views and constituencies. As Jason Solomon puts it, "all the problem solvers are on the same team."¹⁵⁷ For instance, in one of the domains in which Susan Sturm intervenes—higher education—there is general agreement that the lack of women faculty in the sciences is problematic, even if disagreement exists about the reasons for the problem or the best remedies.¹⁵⁸ Such a situation, in which an identity-based movement's equality and inclusion norms are deeply entrenched, does not, at this point, mirror other contexts, both in gender-based advocacy and other identity-based projects, which instead may feature divergent commitments

¹⁵⁵ Lobel, *The Renew Deal*, *supra* note 9, at 378.

¹⁵⁶ Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 179.

¹⁵⁷ Solomon, *supra* note 25, at 834. Cf. Bagenstos, *supra* note 80, at 37 (explaining that "precisely because they are so widely-accepted," "outcome-based measures [in particular contexts] can provide the kind of focal point necessary to make the democratic-experimentalist process of information pooling and benchmarking operate").

¹⁵⁸ See Sturm, *The Architecture of Inclusion*, *supra* note 23, at 255–56 (explaining that all those involved "express[] support for the goal of diversifying the faculty, but when faced with the question of how to reach that goal, many throw up their hands in frustration"); see also Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 205 (explaining that a problem-solving perspective recognizes "an interest in fair treatment shared by both the firm and employees").

and intense disagreement regarding baseline norms.¹⁵⁹ It is necessary, then, to explore the extent to which New Governance techniques work in identity-based contexts that lack baseline agreements.

Without lawyer uptake and in light of a lack of stable, resonant lawyer roles, individuals on the ground must consider the viability of a process that promises substantive agreement based on process norms. Importantly, through their advocacy, the cause lawyers now sitting on the sidelines may have shaped their constituents' perspectives on the proposed process interventions. That is, New Governance interventions face the additional challenge of dislodging issues from a court-centered, adversarial discourse and transplanting such issues into a collaborative scheme that aspires to be less adversarial and less politicized.

This challenge might be most acute in a situation characterized by movement/countermovement dynamics. Take, for instance, the gay rights and Christian Right¹⁶⁰ movements. As I will show in Part IV, *infra*, the intensely adversarial legal and political relationship between these two movements poses a perhaps insurmountable challenge to the consensus norm that New Governance trusts to defuse adversarial interactions and to expose win-win solutions. Instead, interests seem highly stable, entrenched, and comprehensive. Each movement maintains a broad ideological position that encompasses a range of important issues. The gay rights movement emphasizes what should change—focusing on norms about sexuality and the family—and the Christian Right countermovement emphasizes what should not—focusing on normative heterosexuality and the biological, mother-father family.¹⁶¹ Openings for common substance rarely emerge, and trust in a process that promises such common ground seems unlikely.

Moreover, a narrative that positions movements as diametrically opposed and mutually distrustful politicizes substance in a way that obscures

¹⁵⁹ See Solomon, *supra* note 25, at 848 ("Why do new governance scholars think that interests accustomed to battling over policy will put down their swords, share information, and collaborate?").

¹⁶⁰ I use this term, which tracks the terminology used in the relevant scholarly literature, to describe a movement comprised of segments of evangelical Christianity, fundamentalist Christianity, and Catholicism. The movement, of course, should not be thought of as a monolith and certainly exhibits internal disagreement.

¹⁶¹ Mayer Zald and Bert Useem articulated this common movement/countermovement dynamic in their foundational work on social movements. See Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement*, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 247, 270 (Mayer N. Zald & John D. McCarthy eds., 1987); see also Mayer N. Zald, *The Future of Social Movements*, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 319, 328 (Mayer N. Zald & John D. McCarthy eds., 1987).

points for potential common ground. In this sense, not only is the lack of substance in New Governance models troubling in itself, but movement/countermovement relationships may make attempts to remedy these substantive deficiencies especially difficult.

New Governance scholars have yet to grapple with public problems complicated by such intense movement/countermovement dynamics. Instead, interventions in identity-based domains, pioneered by Sturm and De Burca, occupy spaces in which interested parties share baseline norms (and in which forces that are not mobilized toward the articulated goal are indifferent at best).

2. Sham Process, Reinscribing Power, and Privatizing Harm

While a lack of lawyer uptake and movement/countermovement dynamics might hinder participation in a system that trusts process to produce substance, when the actual process is undertaken, the absence of cause lawyers and the lack of substantive baselines might exacerbate (rather than alleviate) problems of interest representation. In fact, fears relating to interest representation may lead cause lawyers themselves to resist New Governance interventions and to advise their constituents against participation. Outsider groups would be submitting to a process, often without strong advocates, in which their interests might be left out or only nominally considered. In the end, the results of the process might merely reinscribe existing power dynamics, allowing the “haves” to come out ahead.

With the air of legitimacy granted by a superficially participatory process, cause lawyers who seek to contest such results on behalf of their marginalized clients might find that New Governance interventions make their court-centered jobs more challenging. Indeed, courts might defer to a process that purports to embody community input and consensus, thereby leaving the “have-nots” in an even more difficult position.

Other scholars have questioned the inclusiveness of participatory governance systems. Susan Carle urges more scholarly attention to the question “of how to avoid processes becoming a mere sham in which all affected interests are ostensibly taken into account, but the insiders and their already vested interests in the end win out once again.”¹⁶² Helen Hershkoff and Benedict Kingsbury, offering a critique of James Liebman and Charles Sabel’s network governance proposal in the public education domain, worry that “network deliberation may tend toward a homogenization of culture and

¹⁶² See Carle, *supra* note 139, at 349. Sabel and Simon concede that “the dynamics of unequal bargaining power affect deliberative as well as pluralist negotiations.” Sabel & Simon, *supra* note 18, at 1100.

the privileging of professionally-credentialed rationality and dominant-group values.”¹⁶³ Archon Fung, in the school reform and community policing contexts, points to the danger of “domination or capture by powerful factions.”¹⁶⁴

Traditional outsiders might face multiple barriers to participation.¹⁶⁵ Outsiders may distrust a process that they see as run by traditional insider groups,¹⁶⁶ and they might feel damaged by previous experiences.¹⁶⁷ New Governance regimes might merely replicate previous top-down attempts at participatory mechanisms, where disempowered groups attempt to move decision makers from pre-determined positions.¹⁶⁸

This potential might render New Governance susceptible to strategic, opportunistic deployment. In circumstances where meaningful participatory inclusiveness seems unlikely, collaborative governance may offer a way to legitimate the insider group’s agenda. That is, some groups might embrace New Governance process to facilitate a power grab rather than to yield a win-win solution.

In this sense, the power of NGOs, which play prominent roles in New Governance models, becomes an important factor in assessing the potential of New Governance interventions. Janet Halley, Prabha Kotiswaran, Hila Shamir, and Chantal Thomas have shown the way in which certain NGOs may gain power inside governing bodies such that a particular vision and agenda of the NGO’s constituent group displaces competing visions and

¹⁶³ Hershkoff & Kingsbury, *supra* note 11, at 322.

¹⁶⁴ Fung, *supra* note 18, at 75.

¹⁶⁵ See John D. McCarthy & Mayer N. Zald, *Appendix—The Trend of Social Movements in America: Professionalization and Resource Mobilization* (1967), reprinted in *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY*, *supra* note 161, at 337, 342 (noting that “[e]ducational attainment and economic position both correlate positively with sociopolitical participation”).

¹⁶⁶ See Sturm, *Gender Equity Regimes*, *supra* note 11, at 331 (explaining that “[d]isempowered groups . . . may distrust deliberative processes that are set up and run by management”).

¹⁶⁷ See Carle, *supra* note 139, at 341 (criticizing New Governance’s “focus on mainstream citizens with an ability to participate actively and exert agency freely, as opposed to marginalized persons who may be too damaged to engage in active involvement in the political process”).

¹⁶⁸ See HANDLER, *supra* note 96, at 203–04 (explaining the problem of the “sham hearing,” Handler notes that “[b]y the time social-reform groups have the chance to exercise their right to participate, the key decisions have been made, the bureaucracy is in a fixed position, and the social-reform groups are placed in the difficult position of trying to get the agency to change its mind”).

agendas.¹⁶⁹ Halley and her co-authors look at this phenomenon in the context of international women's rights work, observing what they label as "Governance Feminism."¹⁷⁰ Dominance by a particular brand of feminism and appropriation of state power for that feminism's needs may also occur on the domestic stage.¹⁷¹ NGOs, then, might capture New Governance systems for their own ends. If NGOs have sufficiently implanted themselves as insiders and if they have received the support of other insiders, they may steer consensus-building processes toward their own agendas. Such a move would render outsider interests even more marginal. The prevailing NGOs would not only have the support of insiders, but their gains would have been legitimated through a process that purports to meaningfully account for all affected interests.

Furthermore, the semi-privatization of collaborative governance regimes might only compound the sense of disempowerment experienced by outsiders with nominal representation. In more traditional regulatory and litigation models, individuals, and the cause lawyers who represent them, are able to voice their sense of injury in a public forum and to use advocacy and rights-claiming to channel feelings of alienation and to raise consciousness among similarly situated individuals.¹⁷² Localized, semi-privatized New Governance regimes might sacrifice these important effects for social movements and the lawyers who represent them.

With the turn away from state-centered strategies and the accommodation of some element of privatization, New Governance models might not only perpetuate existing power differentials but might shroud such differences, allowing them to go unnoticed.¹⁷³ As Scott Cummings points out

¹⁶⁹ Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, & Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335 (2006).

¹⁷⁰ See *id.* at 336.

¹⁷¹ See Carle, *supra* note 139, at 345.

¹⁷² Cf. Scheuerman, *supra* note 26, at 119, 122 (arguing that democratic experimentalists are too quick "to discard certain modern liberal democratic institutional achievements (for example, ambitious lawmaking by centralized representative bodies and core elements of the rule of law);" Scheuerman notes that "little if any attention is paid to . . . the services liberal legal virtues potentially perform for the socially excluded and politically underrepresented").

¹⁷³ See Robert S. Gilmour and Laura S. Jensen, *Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of "State Action"*, 58 PUB. ADMIN. REV. 247, 247 (1998) ("The dimension of governance most often altered significantly by privatization is that of public accountability."); see also Sturm, *Gender Equity Regimes*, *supra* note 11, at 331 (explaining that "[s]ome deliberative processes

in his insightful analysis of community economic development lawyering, while these “new models of cause lawyering have the potential to promote participation and empowerment, they can also channel political action into processes of collaboration and negotiation that shape a more quiescent form of mobilization, resulting in the political disadvantage and co-optation of weaker groups.”¹⁷⁴ Outcomes would become more difficult to contest by outsider groups, who, on the face of it, participated in the process.

A central concern has emerged from this discussion: New Governance systems may promise meaningful participation for outsider interests but may fail to deliver; instead, New Governance regimes might merely confirm the status of outsider groups. Attempts at New Governance participatory structures may rhetorically include disempowered stakeholders but actually cede little or no power.¹⁷⁵ This phenomenon points to the relationship between traditional public interest advocacy and the shift toward New Governance. Rights-claiming litigation has an important legitimating effect for disempowered groups.¹⁷⁶ This is especially true when the group prevails.¹⁷⁷ The legitimating effect of litigation, which empowers group members¹⁷⁸ and garners support from elites,¹⁷⁹ has particular resonance when thinking about New Governance, which presupposes stakeholder status for those implicated by a particular problem or set of issues.

operate outside formal democratic institutions, and may lack methods of accountability connecting direct participants to the concerns and views of the group they represent”).

¹⁷⁴ See Cummings, *Mobilization Lawyering*, *supra* note 5, at 303.

¹⁷⁵ See Burris *et al.*, *supra* note 21, at 49. For instance, some community policing models employ a “rhetorical commitment from the police to ‘listen’ to the community” without corresponding structural changes that give actual power to community members. *See id.* At the next level, these schemes might give some influence to local stakeholders but no actual decision-making power. *See id.*

¹⁷⁶ See, e.g., Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 957 (2007) (“rights-based discourse has a legitimization effect, since rights mythically present themselves as outside and above politics”).

¹⁷⁷ See HANDLER, *supra* note 96, at 30–31 (“Law reformers and foundations feel the need for legitimation from courts. One potent defense against political attack would be a favorable decision by a federal court of appeals since it would appear that the law reformers had acted properly, that their claims were justified in law.”).

¹⁷⁸ See *id.* at 202 (“Through public interest law, underrepresented groups would not only obtain access but they would be listened to.”).

¹⁷⁹ See *id.* at 31 (“Court cases, particularly when they stop a bulldozer or unmask some outrageous practice, can be dramatic and newsworthy, and provide the legitimacy so necessary for support from elites.”).

Effective participation in New Governance collaboration—participation that has real implications for process and outcomes—requires a meaningful seat at the proverbial table. Access by outsider groups must be meaningful in that such groups can actually affect decision making.¹⁸⁰ Indeed, as Susan Sturm contemplates, if “far-reaching social equity [is] both a goal and a precondition for [New Governance] success . . . , then equality is necessary for new governance to work in the first place.”¹⁸¹

This is a crucial moment in thinking about traditional rights-based advocacy and New Governance lawyering. New Governance relies on a model of participation but has yet to elaborate ways for traditional outsiders to participate meaningfully in collaborative governance regimes. Cause lawyers, then, might be faced with the challenging task of contesting outcomes that have the imprimatur of a collaborative, consensus-building process. Consequently, cause lawyers might instead opt for continued rights-claiming litigation, which may secure additional entitlements and legitimate a group’s inclusion claims.¹⁸² In this sense, successful rights-claiming litigation might, in some ways, be a necessary but not sufficient condition for successful New Governance practice.

IV. NEW GOVERNANCE INTERVENTIONS IN IDENTITY-BASED CONTEXTS

In this Part, I offer three examples of New Governance interventions in identity-based contexts. In different ways, these three case studies illustrate the problems with New Governance application identified in the previous Part. They demonstrate that some cause lawyers resist New Governance systems that do not include them and react against vague and underdeveloped roles offered by New Governance programs. Moreover, these examples show that New Governance process may merely reproduce existing power differentials and leave traditionally disempowered groups and individuals with little substantive gain and increasingly less room for public contestation.

¹⁸⁰ Indeed, Joel Handler has noted this in the social movement law-reform context, regardless of New Governance thought. *See id.* at 39.

¹⁸¹ Sturm, *Gender Equity Regimes*, *supra* note 11, at 331. *See also* Scheuerman, *supra* note 26, at 118 (“it might turn out that greater equality is necessary for democratic experimentalism to work in the first place”).

¹⁸² As William Simon concedes, “[t]he most collaborative negotiation will necessarily be influenced by the participants’ assumptions about the background rights of the participants, rights Legal Liberals may be better equipped to define and debate than Legal Pragmatists.” Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 212.

More generally, these examples profoundly question the claim that New Governance offers a paradigm shift in public problem solving. Rather, the failure of New Governance in certain circumstances at least situates New Governance as a contingent model of cause lawyering that complements, rather than replaces, traditional public interest law practice. Indeed, litigation continues to offer a profitable way for marginalized groups to secure substantive benefits and to publicly challenge the status quo. In addition, by elaborating conditions that complicate New Governance practice, these case studies suggest challenges that New Governance theory must face as scholars and practitioners take up new projects and enter additional domains.

A. The First Amendment Center's Guide, "Public Schools and Sexual Orientation"

The First Amendment Center works with schools and communities and relies on consensus documents to deal with contested issues while protecting important First Amendment freedoms.¹⁸³ The First Amendment Center enjoys a proven track record in producing frameworks that help schools and communities deal with contentious religious issues; national NGOs (including public interest law firms), religious organizations, and the federal Department of Education have endorsed its guides.

In 2006, the First Amendment Center released its guide for schools, "Public Schools and Sexual Orientation: A First Amendment Framework for Finding Common Ground" (the guide).¹⁸⁴ The guide provides a process for dealing with various issues most central to the intersection of sexuality and religion in public schools, including student clubs, anti-harassment and anti-

¹⁸³ See The First Amendment Center, *The Bible & Public Schools: A First Amendment Guide*, at 15 (1999), available at http://www.firstamendmentcenter.org/PDF/bible_guide_graphics.PDF [hereinafter *The Bible & Public Schools*]. The First Amendment Center is funded by the Freedom Forum, "a nonpartisan foundation dedicated to free press, free speech and free spirit for all people." *Id.*

¹⁸⁴ See The First Amendment Center, *Public Schools and Sexual Orientation: A First Amendment framework for finding common ground* (2006), available at <http://www.firstamendmentcenter.org/PDF/sexual.orientation.guidelines.PDF> [hereinafter *Public Schools and Sexual Orientation*]. The information about the First Amendment Center process in this Part comes from my interviews with Dr. Charles Haynes of the First Amendment Center and Wayne Jacobsen of BridgeBuilders. I am grateful for their time and insights. While I criticize aspects of the frameworks they employ, I applaud their efforts to bring discussions of sexual orientation into potentially resistant communities, to open up a dialogue between social conservatives and progressives, and to work toward an environment in which all students feel safe.

discrimination policies, curriculum, and free speech.¹⁸⁵ The guide represents a collaboration between the Christian Educators Association International (Christian Educators) and the Gay, Lesbian and Straight Education Network (GLSEN) and was facilitated by Dr. Charles Haynes of the First Amendment Center with the help of Wayne Jacobsen of BridgeBuilders.¹⁸⁶

1. *Principles*

The guide emphasizes five bedrock New Governance principles, each of which I will briefly address.

a. *A Turn Away from Adversarial Win-Lose Scenarios and Litigation*

After noting that “[c]onflicts over issues involving sexual orientation in the curriculum, student clubs, speech codes and other areas of school life increasingly divide communities, spark bitter lawsuits, and undermine the educational missions of schools,”¹⁸⁷ the guide specifically moves away from a litigation framework. Rather than adhere to the perceived current approach, in which “[a]dvocacy groups on both sides are working hard to promote their

¹⁸⁵ See *id.* at 2 (referring to “sexual orientation in the curriculum, student clubs, speech codes and other areas of school life”). It is important to note that the process advocated by the First Amendment Center is not merely a mediation process, although it resonates with thinking on mediation and negotiation. Haynes and Jacobsen are not mediators, and Jacobsen is careful to note that he is a facilitator. *Telephone Interview with Wayne Jacobsen* (April 14, 2008) (notes on file with author) [hereinafter Jacobsen Interview]. As scholarship on mediation and negotiation makes clear, many in the field stress “a mediator’s active participation,” including “active insertion . . . in the conflict, and active guidance of the parties toward agreement.” Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 327 (2006). Jacobsen, on the other hand, emphasizes that he seeks to empower community members to conduct their own process. Jacobsen Interview, *supra*.

¹⁸⁶ *Public Schools and Sexual Orientation*, *supra* note 184, at 1. BridgeBuilders facilitates collaborative decision-making processes in local communities. It opens its website with the following statement: “In a world where angry voices serve their agendas as the only just cause, where people demand their rights at the expense of others and where our institutions are satisfied with narrow-margin victories that are easily overturned when the winds of power shift, how can a community avoid angry polarization? Facing divisive issues [such] as religion in schools and policies regarding sexuality, schools and communities end up in deep conflict or litigation, resulting in court-ordered ‘solutions’ that satisfy no one.” BridgeBuilders, <http://www.bridgebuilders.org> (last visited Aug. 27, 2008).

¹⁸⁷ *Public Schools and Sexual Orientation*, *supra* note 184, at 2.

perspective in the schools,”¹⁸⁸ the guide instructs that “[i]f schools are going to win the peace, it will not be by choosing a side and coercing others to accept it.”¹⁸⁹ While advocacy and adversarialism compel schools to choose sides, which “only provokes more conflict and solves nothing,”¹⁹⁰ the guide focuses on collaborative decision making to reach solutions that all community members can embrace. In turning away from nationalized win-lose scenarios and toward localized win-win situations, the guide explains that “[c]ivil local discussions that lead to solutions are less costly, less divisive, and more effective than lawsuits or shouting matches in the media.”¹⁹¹

b. *A Focus on Fair Process*

The guide is almost completely silent on actual content, instead emphasizing process as a means of illuminating substance. Advocating “a process of deliberation that is open and fair,”¹⁹² the guide states that “[i]t is possible . . . to find areas of agreement if school officials create a climate of mutual respect and honest dialogue.”¹⁹³ To this end, it urges schools to create a “common ground task force” consisting of community members representing a range of perspectives.¹⁹⁴ With proper ground rules, “all sides come to the table prepared to seek a greater common good.”¹⁹⁵ The guide sees substance emerging from good process: “By building relationships among people with opposing views, the task force builds trust and mutual respect that can translate into shared agreements on school policy and practice.”¹⁹⁶

c. *Stakeholder Inclusion*

The guide urges school officials to “[i]nclude all stakeholders,” encouraging such stakeholders to “[t]hink outside the box of ‘us vs. them’

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 3.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 5.

¹⁹² *Id.* at 4.

¹⁹³ *Public Schools and Sexual Orientation*, *supra* note 184, at 3.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

politics.”¹⁹⁷ More specifically, it is necessary to “includ[e] all of the stakeholders in the effort to develop policies that promote fairness for all and practices that can be widely supported.”¹⁹⁸ Such stakeholders must represent “a wide range of community views.”¹⁹⁹ The guide locates schools as “honest brokers of a dialogue that involves all stakeholders and seeks the common good.”²⁰⁰ The inclusion of diverse stakeholders serves as a vehicle to move outside of one-sided advocacy discourse, as the guide contends that “[p]olicy decisions about issues concerning sexual orientation should be made only after appropriate involvement of those affected by the decision and with due consideration for the rights of those holding dissenting views.”²⁰¹

d. *Public-Private Partnerships*

Rather than locate schools within the realm of advocacy,²⁰² the guide situates schools as facilitators of fair, measured policymaking with an eye toward “serv[ing] the entire community.”²⁰³ As honest brokers, schools have a distinct institutional role to foster participation and solutions. More concretely, the guide advocates a “common ground task force” which would advise the school board on a range of issues, thus giving community members some capacity in policy formation.²⁰⁴ Transparency is also a value key to the idea of public-private partnerships; as the guide instructs, schools must “talk openly about these issues,” rather than “seek to avoid controversy by trying to fly under the radar when dealing with this complicated issue.”²⁰⁵

e. *Local Experimentation*

In its tips for school officials, the guide instructs administrators to “[a]ssure parents and students that the school district will listen carefully, be fair to all parties, and try hard to avoid choosing sides in the broader national

¹⁹⁷ *Id.* at 4.

¹⁹⁸ *Id.* at 3.

¹⁹⁹ *Public Schools and Sexual Orientation*, *supra* note 184, at 3.

²⁰⁰ *Id.* at 2.

²⁰¹ *Id.*

²⁰² *See id.* at 4 (“[a]dvocacy groups play an important role in a democracy . . . public schools have a very different role”).

²⁰³ *Id.*

²⁰⁴ *Id.* at 3.

²⁰⁵ *Public Schools and Sexual Orientation*, *supra* note 184, at 5.

conflict.”²⁰⁶ The guide instructs community members to “strive to keep your community discussion a local one.”²⁰⁷ While it acknowledges that “outside groups and individuals [can] be helpful facilitators or resources, and [include] some perspectives that are important to the discussion [but] may not be well represented in your community,” the guide also stresses that “neighbor-to-neighbor dialogue works best when a local disagreement doesn’t become a national controversy.”²⁰⁸ In addition, it recognizes the policy variations that may occur from state to state as groups work with background laws setting default positions and possibilities. As the guide acknowledges, “[t]he laws of each state (which vary widely and change frequently) are both the starting point and framework for addressing sexual orientation in local schools.”²⁰⁹

2. Professional and Representational Challenges

a. Lawyer Uptake

This section shows how a lack of lawyer uptake posed substantial problems for the implementation of the guide’s New Governance strategy.

In its school governance guides, the First Amendment Center seeks to bring on board a mix of national legal, religious, and education groups. A range of organizations has found common ground in previous non-litigation efforts facilitated by the First Amendment Center in the religion context. For instance, various education NGOs and unions, as well as legal organizations such as the Christian Legal Society (CLS) and the Anti-Defamation League (ADL), expressly endorsed the Bible guide,²¹⁰ and the ACLU later promoted it extensively.²¹¹ Dr. Charles Haynes, who spearheaded the sexual-orientation-focused guide, modeled it on these other agreements,²¹² but replicating the process used in the purely religious domain in the sexual

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 3.

²¹⁰ *The Bible & Public Schools*, *supra* note 183, at 16.

²¹¹ See Statement on *The Bible in Public Schools: A First Amendment Guide*, American Civil Liberties Union, <http://www.aclu.org/religion/schools/29618res20070509.html> (last visited Jan. 20, 2009).

²¹² For instance, the First Amendment Center’s guide on the role of religion in public school curricula proved extremely useful, and numerous schools have used it to filter out courses that would be unconstitutional under Establishment Clause jurisprudence.

orientation context proved especially difficult. According to Haynes, past agreements were built on trust and a small network of repeat players, but no such similar starting point existed in the sexual orientation context.²¹³

Haynes first approached GLSEN, an education-focused lesbian, gay, bisexual, and transgender (LGBT) organization, which he found to be receptive. Next, Haynes considered how best to include conservative Christian groups in the drafting process. Comparing the issue to the evolution/intelligent design debate, Haynes believed that some evangelicals would fault members merely for participating in a meeting on the topic, especially one with GLSEN, a group thought of as part of a “homosexual agenda.” He first approached Christian Educators, a relatively small group, but one that represents conservative Christians working in the public schools. Haynes thought that Christian Educators would likely be more receptive than some of the other national Christian groups, having seen through the organization’s service on a religion advisory committee in California that the group wanted a place at the table and worked effectively with diverse stakeholders. The leader of Christian Educators, himself a former superintendent of schools, committed to join the drafting process. As the process continued, Haynes convinced two national, non-partisan education organizations to join the consortium: the American Association of School Administrators (AASA) and the Association for Supervision and Curriculum Development (ASCD).

At this point, modeled on his efforts in the past, Haynes invited other groups to join. He made the decision to reach out to conservative Christian groups first. When Haynes approached Christian public interest law firms, he found unyielding resistance. In his view, the increased litigation posture of these groups makes their involvement in negotiative, non-litigation processes more difficult. While Haynes never received an explicit rejection from the Christian Legal Society (CLS), which had joined the First Amendment Center’s religion guides, the group ultimately did not join.²¹⁴ While CLS was at one point more of a litigation avoidance actor committed to negotiated pre-litigation resolutions, Haynes has seen it become less interested in such strategies. Similarly, the American Center for Law &

²¹³ See Telephone Interview with Dr. Charles Haynes, Senior Scholar, First Amendment Center (Feb. 29, 2008) (notes on file with author) [hereinafter Haynes Interview].

²¹⁴ A similar implied rejection came from the National Association of Evangelicals. See *id.*

Justice (ACLJ) did not sign on, explaining that the group's constituents would not likely support endorsement of the guide.²¹⁵

Without having Christian legal organizations sign on, Haynes made the decision to release the document as quickly as possible. He worried that if he waited and attempted to make inroads with Christian groups, Christian Educators would back out, thus leaving no endorsement by a conservative Christian group. This concern was particularly acute given Christian Educators' ties to CLS, which provides the group with legal advice. Haynes released the guide, deciding that with the two lead education groups—Christian Educators and GLSEN—he could promote it.

Notably, no gay rights or left/progressive legal organization explicitly endorsed the guide.

b. The Absence of Lawyers and Legal Norms

The previous section demonstrated that the guide's framers sought the endorsement of legal organizations. Realizing how influential cause lawyers are in the implicated movements, the framers attempted to gain their approval. Yet at the same time, as this section shows, lawyers were excluded from the process, and such exclusion might have contributed to their lack of endorsement.

The guide explicitly urges community members and school officials not to include outside advocates. Charles Haynes does not see a place in local community disputes for legal groups.²¹⁶ Likewise, Wayne Jacobsen rejects outsider involvement, instead advocating the inclusion only of facilitators and local community members. In fact, he believes any individuals subject to political pressures and needing to answer to constituents—including at times school board members and lawyers—are detrimental to the process. Jacobsen sees the removal of political accountability as a way to shift the focus from a process where individuals are devising how to fund a lawsuit and media campaign to one with principled dialogue and shared solutions.²¹⁷ In a way, the same impulse against litigation and conflict that drives the New Governance intervention keeps the process and its backers from including lawyers and articulating cause lawyer roles.

The guide moves away from litigation in a domain in which litigation is pervasive. In explaining the ACLU's reluctance to sign on explicitly to consensus guides from the First Amendment Center, Jacobsen notes that

²¹⁵ E-mail from Dr. Charles Haynes, Senior Scholar, First Amendment Center, to author (April 27, 2008) (on file with author).

²¹⁶ See Haynes Interview, *supra* note 213.

²¹⁷ See Jacobsen Interview, *supra* note 185.

signing on would compromise the ACLU lawyers' ability to litigate; they would not want to initiate litigation only to see an opposing group undercut the ACLU's effort by pointing out that the group signed on to a document effectively rejecting litigation.²¹⁸ Of course, this is not to say that such cause lawyers do not engage in non-litigation strategies; rather, the displacement of litigation by a comprehensive, formalized non-litigation strategy in this area might reduce lawyers' ability to move between strategies and to preserve a pure advocacy role.

Moreover, the guide lacks legal baselines or substantive commitments. This renders cause lawyer uptake more unlikely, especially since the guide concerns highly contested issues. It is less law-oriented than the First Amendment Center's other guides, which focus more on established legal principles in the religion domain and thereby present a less contested picture. Noting a trend among Christian legal groups which finds them more likely to sign on to guides centered on legal norms, Jacobsen believes that given that the guide focuses more on process than on law, legal groups are reluctant to endorse it.²¹⁹

The First Amendment Center's New Governance intervention devalues the roles that gay rights and Christian Right cause lawyers emphasize and at which they excel, yet it does so in the context of movements that are fairly law-centered and lawyer-dominated, such that the deployment of lawyers is intimately tied to each movement's success. Intervening with a framework that devalues these lawyers' strengths fails to sell the promise of collaborative governance to some of the actors most necessary to its successful uptake. These lawyers evidence significant strengths in roles vital to New Governance yet neglected or minimized by current New Governance thought. Two of these roles relate to the issues of representation and expertise discussed in Part II.A, *supra*.

Cause lawyers for the gay rights and Christian Right movements have made careers of representing potentially marginalized groups and forcing official decision makers to take seriously the claims and interests of such groups. A process that discounts that role and instead compels constituents to frame and articulate their own interests might, perhaps counterintuitively, make citizen participation less likely and might facilitate the continued marginalization of outsider voices. Participation in democratic decision making requires citizens to voluntarily voice interests in a public forum; citizens not schooled in public participation might resist such participation,

²¹⁸ *See id.*

²¹⁹ *See id.*

especially when their perspectives are considered unpopular.²²⁰ If included, professional social movement lawyers could facilitate involvement of outsider groups and represent marginalized perspectives.

Furthermore, the guide fails to look to the expertise offered by cause lawyers in this domain, instead leaving deliberation of complicated issues solely to local participants. School-based litigation, however, suggests that attorney expertise up front on doctrinally complex and politically sensitive issues may avoid later litigation and actually defuse adversarial interactions. Litigation in Ector County, Texas regarding the school district's Bible course provides an illustration. The Director of Litigation of the ACLU's Program on Freedom of Religion and Belief commented that in light of the litigation and settlement agreement, the school officials now have a better understanding of what is constitutionally permissible.²²¹ Indeed, the settlement agreement itself created "a clear roadmap if [the school] decides to adopt a new course."²²² Had lawyers' expertise, both from a civil liberties and a religious perspective, been present from the beginning stages of curricular development, perhaps the school could have avoided a lawsuit. Instead, the school district ushered in the controversial curriculum without consultation.

Lawyers can bring expertise to school districts and community members at the level of policy formation. The First Amendment Center's guide explains that different legal norms regarding sexual orientation will provide different baselines and frameworks for the local deliberative process. Here, then, is an opportunity for the process framers to construct a role for cause lawyers who are clearly expert in the state of the law regarding sexual orientation and to bring expert lawyers in at the outset.

c. The Leap to Substance

While the two previous sections focused on lawyer inclusion, this section looks to substantive possibilities offered by the New Governance process.

The guide does not make specific content recommendations, but rather suggests that a process based on "trust and mutual respect . . . can translate into shared agreements on school policy and practice."²²³ It offers little

²²⁰ See Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 175.

²²¹ See *ACLU Successfully Helps Parents Challenge Bible Classes in Texas Public Schools*, American Civil Liberties Union, <http://www.aclu.org/religion/schools/bibleinpublicschools.html> (last visited Jan. 20, 2009).

²²² *Id.*

²²³ *Public Schools and Sexual Orientation*, *supra* note 184, at 3.

concrete instruction on how and provides no suggestions as to what these shared agreements might look like.

Moreover, with a movement/countermovement relationship characterized by distrust, the process itself seems to run counter to the current strategies of both movements. In fact, Wayne Jacobsen explains that Christian Educators and GLSEN both “paid a price” with their respective movements for their involvement in the First Amendment Center’s effort.²²⁴ In the aftermath of the press conference announcing and disseminating the guide, Christian Educators received criticism from various conservative groups as well as its constituents. Perhaps the comments of Christian Educators’ leader, Finn Laursen, evidence this pushback. Laursen’s tone sounded materially different than that of Haynes and GLSEN, commenting that his group’s “endorsement of the guidelines . . . is in no way a wandering away from, change or compromise of our long established support of traditional family values and Biblical standards.”²²⁵ Furthermore, Laursen framed the guide more as a way to prevent school districts from pushing forward pro-gay positions without parents or Christian advocates knowing, explaining that “emotions escalate when not all stakeholders are included from the onset and the issues surrounding homosexuality come in ‘under the radar.’”²²⁶ To Laursen, the guide facilitated input from the outset as a means of cutting off the advocacy agenda of pro-gay groups.

Furthermore, lawyers, and their constituents, may be skeptical of a system that promises common ground for two movements that often share little in terms of normative commitments and policy goals. In this environment, seemingly uncontroversial issues are politicized. For instance, safety is the only content-based idea to which the guide points. The guide explains that “[a]ll parents . . . want schools to be safe learning environments where no student is harassed or bullied for any reason,” and that “most people will support policies that prohibit the mistreatment of any individual or group and provide appropriate avenues for redress of grievances.”²²⁷ In the currently polarized movement/countermovement environment, however, even anti-bullying measures are identified with a particular ideological orientation. For instance, in Massachusetts, social conservative advocacy group MassResistance vigorously opposed an anti-bullying bill pending in the state legislature. Acknowledging that “[b]ullying in schools can be a

²²⁴ See Jacobsen Interview, *supra* note 185.

²²⁵ See Press Release, First Amendment Center, *1st consensus guidelines offered for schools on sexual orientation*, Apr. 26, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16612> (last visited Mar. 9, 2009).

²²⁶ *Id.*

²²⁷ *Public Schools and Sexual Orientation*, *supra* note 184, at 4.

problem,” the group nonetheless referred to “an ‘anti-bullying’ agenda” and explained that “these particular types of programs were being pushed by the homosexual lobby, and were mostly a front for pushing their agenda.”²²⁸ Similarly, Citizens for Community Values describes the issue of school safety as a Trojan horse, used by advocacy groups to “delude” decision makers “into adopting the pro-homosexual agenda.”²²⁹ The difficulty in dislodging issues from adversarial relationships and broader ideological contexts challenges New Governance assumptions about process and win-win solutions.

B. *The Montgomery County Citizens Advisory Committee*

The First Amendment Center’s guide represents a global, high-level attempt to facilitate New Governance process at the local level. It is helpful now to turn to one such local intervention, which derives from a dispute in Montgomery County, Maryland. The Montgomery County School Board initiated a plan to add three lessons to its health and sex education curriculum for eighth and tenth graders. These lessons included issues relating to sexual orientation, gender identity, condom use, and sexually transmitted infection.²³⁰

Citizens for a Responsible Curriculum (CRC), a local organization that formed in response to the curricular changes, challenged the curriculum in federal court. Parents and Friends of Ex-Gays and Gays (PFOX) joined CRC, and Christian public interest law firm Liberty Counsel represented both. The federal district court enjoined implementation of the curriculum.²³¹ CRC and PFOX challenged a revised curriculum, this time in the state administrative system and state court, with representation by another

²²⁸ *Victory and defeat: In unannounced session, Education Committee caves to pressure—sends both pro-homosexual Planned Parenthood bill AND Parents’ Rights bill to “study”—effectively killing them*, MASSRESISTANCE, Feb. 15, 2008, http://www.massresistance.org/docs/gen/08a/pr_bill_news_021505.html (last visited Mar. 9, 2009).

²²⁹ See CITIZENS FOR COMMUNITY VALUES, THE LEGAL LIABILITY ASSOCIATED WITH HOMOSEXUALITY EDUCATION IN PUBLIC SCHOOLS, *available at* http://www.ccv.org/downloads/pdf/Legal_Liability_of_Homosexuality_Education.pdf.

²³⁰ *Citizens for a Responsible Curriculum v. Montgomery Cty. Bd. of Educ.*, Opinion No. 07-30, at 2 (Md. St. Bd. of Educ. June 27, 2007), *available at*, <http://www.marylandpublicschools.org/MSDE/stateboard/legalopinions/> (follow “ALPHABETICAL INDEX” hyperlink; then follow “Citizens for a Responsible Curriculum, et al. v. Montgomery County Board of Education 07-30” hyperlink).

²³¹ *Citizens for a Responsible Curriculum v. Montgomery Cty. Pub. Schs.*, Case No. AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005).

Christian public interest law firm, the Thomas More Law Center (TMLC). Lambda Legal, a national LGBT legal organization, helped defend the school district's curriculum by representing advocacy organization Parents, Families, & Friends of Lesbians and Gays (PFLAG) in an *amicus curiae* capacity.

After the federal court granted a preliminary injunction against the health curriculum (and before the second round of litigation), the parties entered a settlement agreement that specified a collaborative process for curricular revision.²³² The Board of Education named new members to the Citizens Advisory Committee (CAC) on Family Life and Human Development to review and revise the curriculum, make recommendations to the Board, and oversee implementation. Although the settlement agreement restructured CAC to include new stakeholders, the committee itself already existed and helped design the first curriculum challenged in federal court.²³³ The idea of the committee accords with guidelines relating to sex education in Maryland,²³⁴ showing that the state education department embraced a collaborative process to develop sex education curriculum at a local level rather than through specific state-wide mandates.

1. Principles

As with the First Amendment Center's guide, the process used in Montgomery County resonates with five significant New Governance themes, and I will briefly situate the model within these features.

a. *A Turn Away from Winner-Take-All Litigation*

Having emerged from a settlement agreement, the model represents a literal turn away from continued litigation. The purpose of the process was to consider various views on the curricular issues and to devise a curriculum that reflected consensus and would not lead to additional litigation.

²³² Memorandum from Jerry D. Weast, Superintendent of Schs., to Members of the Bd. of Educ., Montgomery County Public Schs. 2 (Jan. 9, 2007) (on file with author), available at <http://www.montgomeryschoolsmd.org/info/pdf/BoardHealthEdpaper1-9-07.pdf> [hereinafter Weast Jan. 9 Memorandum].

²³³ See Memorandum from Jerry D. Weast, Superintendent of Schs., to Members of the Bd. of Educ. (Nov. 9, 2004) (on file with author) (including CAC report on initial revisions to health curriculum regarding condom use demonstration and sexual orientation instruction).

²³⁴ See MD. CODE REGS. § 13A.04.18.03(D)(1) (2007).

b. *Stakeholder Inclusion*

The 15 CAC members consisted of eight community members, including parents, students, physicians, and healthcare professionals, and seven members representing stakeholder organizations, including representatives from CRC, PFOX, PFLAG, and Teach the Facts, a community group supporting the initial curriculum.²³⁵

c. *Public-Private Partnerships*

CAC was composed of a variety of community interests, including private citizens representing themselves and individuals representing NGOs and advocacy organizations. CAC members proposed changes to the curriculum, which they presented to the superintendent and Board of Education. CAC submitted two reports, which together proposed 83 changes.²³⁶ School district officials incorporated 69 of the 83 changes recommended by CAC.²³⁷ CAC has a continuing role in overseeing field testing, revision, and implementation. CAC and the Board of Education looked to NGOs like PFLAG and GLSEN for guidance and expertise.²³⁸

d. *Local Decision Making*

CAC was chaired by a community member, Dr. Carol Plotsky, a leading pediatrician and a former attorney.²³⁹ Local education experts assisted CAC in its deliberations, including the school district's director of curriculum and

²³⁵ See *Citizens for a Responsible Curriculum v. Montgomery Cty. Pub. Schs.*, Case No. 284980, at 2 (Md. Cir. Ct. Jan. 31, 2008); Weast Jan. 9 Memorandum, *supra* note 232, at 1–2; Letter from Regina Griggs, Executive Director of PFOX, to The Honorable Nancy Navarro, President of Montgomery County Board of Education & Dr. Jerry West, Superintendent of Montgomery County School District (Apr. 19, 2007) (on file with author), available at http://www.mcpscurriculum.com/pdf/BOE_PFOX_4_07_letter.pdf [hereinafter Griggs Letter].

²³⁶ Weast Jan. 9 Memorandum, *supra* note 232, at 2.

²³⁷ Daniel de Vise, *Sex-Ed Plan Could Revive Heated Debate from 2005*, WASH. POST, Jan. 5, 2007, at B4.

²³⁸ See Letter from Michelle Turner, President, Citizens for a Responsible Curriculum, to Dr. Jerry Weast, Superintendent, Montgomery County School District 4 (Dec. 12, 2006) (on file with author), available at <http://www.mcpscurriculum.com/pdf/MinorityReportFinalized.pdf> [hereinafter Turner Letter].

²³⁹ Dr. Plotsky served previously both as the chair of the Shady Grove Adventist Hospital's Department of Pediatrics and as Connecticut Assistant Attorney General. See Weast Jan. 9 Memorandum, *supra* note 232, at 3.

instruction.²⁴⁰ Four physicians recommended by the Maryland Chapter of the American Academy of Pediatrics served as volunteer medical consultants.²⁴¹ All four medical consultants were residents of Montgomery County, and three had children in the school system.²⁴² The curriculum that ultimately emerged, which features a 90-minute lesson for eighth and tenth graders on “Respect for Differences in Human Sexuality” as well as a 45-minute lesson for tenth graders on condom use, largely represents the school district’s original work, whereas the previous curriculum had borrowed heavily from materials used in a Canadian school system.²⁴³

e. Flexibility

Allowing for reflection, revision, and flexibility, the school district field tested the lesson plans, and reported that 91% of the students involved had received the parental permission required to participate in the field test.²⁴⁴ Results from different schools were compared.²⁴⁵ In New Governance thought, the pooling of information from local experiments allows peer institutions to compare performance and learn from one another.²⁴⁶ As the superintendent described, staff “analyzed feedback collected throughout the field test and made minor revisions to the lessons to improve instruction.”²⁴⁷ The guidance for teachers was also revised.²⁴⁸ As the state superintendent explained in denying the request for a stay against the field testing of the

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1.

²⁴² *Id.* at 3.

²⁴³ *Id.* at 4 (“Much of the new curriculum . . . was developed by MCPS as original work, due in large measure to the ground-breaking steps by the Board of Education to usher in this improvement in health education and the lack of suitable curriculum materials for students nationally.”).

²⁴⁴ See Memorandum from Jerry D. Weast, Superintendent of Sch., to Members of the Bd. of Educ. 3 (June 12, 2007) (on file with author) [hereinafter “Weast June 12 Memorandum”].

²⁴⁵ See *id.* at 3.

²⁴⁶ See Sturm, *Gender Equity Regimes*, *supra* note 11, at 332.

²⁴⁷ Weast June 12 Memorandum, *supra* note 244, at 1.

²⁴⁸ *Id.* at 5 (“Professional development will be revised to address instructional strategies for below grade level readers, emphasize the rationale for scripted lessons, and provide application and problem-solving exercises to promote effective responses to student questions in class.”).

revised curriculum, the purpose is “to identify problems and to decide how to fix them.”²⁴⁹

2. Professional and Representational Challenges

a. Lawyer Inclusion

This section briefly comments on the position of lawyers in the Montgomery County process, which neither expressly included nor defined roles for lawyers. A lawyer headed CAC but was valued not for her former career as a successful attorney but instead for her current role as a doctor, child health specialist, and community member. Moreover, the school district’s counsel and an attorney at a large law firm were available to provide legal assistance, but the cause lawyers involved in the litigation that yielded the process were not included. While PFOX and CRC had representation on CAC, they were not joined by the public interest lawyers representing them; such lawyers seemed to wait on the sidelines, eager to reinstitute litigation as the process broke down. As an attorney representing CRC and PFOX remarked after the state court’s decision in favor of the school district, “We’re not going to get out of town or disappear. We’re not leaving.”²⁵⁰ Cause lawyers representing their respective movements were committed to working on the contentious issues addressed by CAC, yet the New Governance process that sought to replace litigation made no effort to include them in a meaningful way.

b. Moving from Process to Substance in a Movement/ Countermovement Setting

This section teases out the relationship between process impediments and substantive outcomes. Instead of entering a process with lawyer representation, stakeholders, including those from the LGBT and conservative Christian communities, were expected to enter a collaborative process premised on the idea that bringing the various community interests

²⁴⁹ Order of the Superintendent in *Citizens for a Responsible Curriculum v. Montgomery Co. Bd. of Educ.* 4 (March 7, 2007) (on file with the author) [hereinafter *Order of Superintendent*].

²⁵⁰ Thomas More Law Center, MD Judge Rules Illegal Gay/Erotic Curriculum OK (Feb. 6, 2008), <http://www.thomasmore.org/qry/page.taf?id=20> (follow “Archives” hyperlink; then follow “MD Jude Rules Illegal Gay/Erotic Curriculum OK” hyperlink) (last visited April 22, 2008).

into the process would yield programming accepted (if not endorsed) by all parties. Of course, this proved not to be the case.

The CAC model became another tool in an ongoing adversarial process. With distrust in Montgomery County running high, the fact that such process emerged from contentious litigation made the task of cleaving it from an adversarial setting even more challenging. While lawyers on the one hand helped devise the CAC process, they were also quick to return to court after the first round of the process played out and key stakeholders, including CRC and PFOX, disengaged from the process when they did not approve of the substantive results.

In many ways, the process itself replicated the adversarial interactions that characterized the earlier litigation. One CAC member, in the words of CRC's president, "left the committee in outrage over its outright bias in favor of gays and exclusion of ex-gays."²⁵¹ While she presented her concerns to the Board of Education, she faulted CAC for refusing to act on them.²⁵² In the end, CRC and PFOX, along with one other CAC member, submitted a "minority report," detailing revisions not embraced by the majority of CAC.²⁵³ No document emerged that had the approval of the entire committee.

With key stakeholders' substantive commitments diametrically opposed—*e.g.*, GLSEN's focus on accepting gay identity and the innateness of sexual orientation versus PFOX's endorsement of ex-gay status and changing sexual orientation—the move from process to substance proved impossible. Exploring the characteristics of two key stakeholder groups—lesbians and gay men and conservative Christians—leads to a better understanding of how movement/countermovement dynamics complicate New Governance's focus on process and the leap to substance.

The gay rights movement and the Christian Right movement have a contentious, well-publicized movement/countermovement relationship. Both tend to focus on the segments of the other that evoke the most outrage from constituents and that paint the other as extreme and destructive.²⁵⁴ For

²⁵¹ Turner Letter, *supra* note 238, at 2.

²⁵² *See id.*

²⁵³ *Id.*

²⁵⁴ Psychological work in negotiation theory is helpful here. Russell Korobkin explains how attribution bias work shows that "when acts of others harm us, we are more likely to conclude that 'they' are bad people who have acted with malice or indifference." *See* Korobkin, *supra* note 185, at 302. This surely resonates with the gay rights/Christian Right movement/countermovement narrative. Moreover, the attribution bias effect "can be reinforced and deepened by a related bias known as 'naïve realism,'" in which "[w]e believe that our understanding of the world is authentic . . . [and] if others do not agree

instance, the gay rights movement's depiction of the Christian Right often focuses on that movement's ties to ex-gay ministries, which urge lesbians and gay men to change their sexual orientation. The Montgomery County situation played into this depiction. PFOX, allied with CRC in challenging the curriculum, represents "ex-gays," and accordingly endorses "conversion therapy" for lesbians and gay men,²⁵⁵ seeing homosexuality as a condition that can (and should) be changed, rather than as a stable orientation. The process undertaken in Montgomery County gave PFOX stakeholder status, including a PFOX representative on CAC. This resonates with the New Governance "presumption of inclusion."²⁵⁶ The process was trusted to weed out illegitimate claims and interests. Indeed, the process produced a curriculum that excluded PFOX's views.

PFOX complained that other CAC members were openly hostile to its position, claiming that "three of the CAC members showed outright disrespect and intolerance of the ex-gay community," including an episode in which a Teach the Facts member compared PFOX to "the Klan and child molesters."²⁵⁷ At the same time, gay rights groups resisted open collaboration (and potential compromise) with a group that calls for rejecting one's gay identity and thereby perpetuates the sexual shame in gay and lesbian youth that the curriculum in Montgomery County is designed to combat. Lesbians and gay men may experience dignitary harm in acknowledging PFOX's position as potentially legitimate; even if a collaborative process selects out PFOX's position, the mere inclusion of PFOX might signal such legitimacy.

The focus on extreme positions found in the other movement might make sense from movement organizing and publicity perspectives. For instance, focusing on the ex-gay movement produces outrage in lesbian and gay constituents and helps construct the public image of the Christian Right as anti-gay, irrational, and out of touch with mainstream medicine. But from a collaborative governance perspective, this move bolsters the claim that the two movements share no substantive common ground. In this sense, firmly

with our view of the world or our view of facts, then they must be misinformed, biased, insensitive, or self-interested." *See Id.* at 302–03.

²⁵⁵ *See* Parents & Friends of Ex-Gays & Gays, About, <http://www.pfox.org/about.htm> (last visited Jan. 22, 2009) (noting that "[n]ot all ex-gays underwent reparative therapy," and discussing such therapy at length and contending that "[n]one of the medical or scientific associations prohibit reparative therapy or any other change therapy") (on file with author).

²⁵⁶ Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 210.

²⁵⁷ Griggs Letter, *supra* note 235, at 2.

entrenched representational moves grounded in an adversarial model actually undermine attempts at participatory process.

In addition, each movement may view a collaborative decision-making process that relies on process norms to reach content solutions as simply too risky. This relates both to ideas about the other movement and to perceptions of inside decision makers.

First, lesbians and gay men and conservative Christians (or progressives and social conservatives more generally) tend to view one another as especially powerful. Social conservatives often portray lesbians and gay men as affluent and as possessing inordinate political power.²⁵⁸ Even Justice Scalia falls back on a caricature of the lesbian and gay population, explaining in his dissent in *Romer v. Evans* that lesbians and gay men “have high disposable income” and “possess political power much greater than their numbers, both locally and statewide.”²⁵⁹ Similarly, pro-gay and progressive advocates tend to perceive conservative Christians as particularly powerful.²⁶⁰

Social movement scholars have shown that a turn toward courts and away from majoritarian or negotiative routes makes sense when a group lacks political power (or perceives a relative lack of political power).²⁶¹ This insight suggests that both groups might have reasons, based both on perception and reality, to resist collaborative decision making and to hew to court-centered strategies.

Next, both groups doubt the legitimacy of school decision making. Gay rights groups are skeptical of majoritarian politics. They might view schools as subject to majoritarian pressures that dismiss sexual orientation issues in light of the presence of impressionable, politically sensitive, presumptively

²⁵⁸ See JAMES W. BUTTON, BARBARA A. RIENZO, KENNETH D. WALD, *PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES* 196 (1997).

²⁵⁹ 517 U.S. 620, 645–46 (1996) (Scalia, J., dissenting).

²⁶⁰ See BUTTON *ET AL.*, *supra* note 258, at 150 (documenting gay rights issues in local communities, the authors note that a school official in Cincinnati revealed his belief that religious conservatives possess “more power than they should have, given their numbers”).

²⁶¹ See HANDLER, *supra* note 96, at 22 (“Courts have always been used by those who find the balance of political forces against them.”); Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 5, at 37, 50 (“The mobilization of law is . . . often a useful way for groups that are disadvantaged by the majoritarian political process to access and leverage the power of the state on behalf of their interests.”).

non-sexual (or at least heterosexual) children.²⁶² On the other hand, conservative Christians, seemingly in conflict with the majoritarian fears of the LGBT community, might view schools as governed by an elite professional class, guided by secularism and liberal politics.²⁶³ As Christian public interest law firm ACLJ explains, “the public educational establishment increasingly embraces liberal ideology and secularism, sometimes to the point of hostility against religion, particularly

²⁶² See Letter to John Coyne, Chairperson, Portland School Committee, from Jay Alan Sekulow, Chief Counsel, American Center for Law and Justice at 2 (Nov. 2, 2007) (in a demand letter to the Portland, Maine school board to stop a contraception availability program, ACLJ appeals in its statement of facts to one community member’s reaction that “[w]e are dealing with children . . . I am just horrified at the suggestion”).

²⁶³ Conservative Christians might be rightly concerned about insider bias against them. A recent study conducted by the Institute for Jewish and Community Research found a bias among faculty members in higher education against Evangelicals. Alan Cooperman, *Is There Disdain For Evangelicals In the Classroom?*, WASH. POST, May 5, 2007, at A3. Of the respondents, 53% admitted unfavorable feelings toward Evangelicals, the most by far for any religion. See *id.* David French, the director of ADF’s Center for Academic Freedom, explained in the Christian press that the study shows “an overwhelming ideological bias that manifests itself in concrete ways.” Mark Bergin, *Tenured bigots: most faculty members don’t like evangelicals and aren’t ashamed to admit it*, FREE REPUBLIC (Aug. 18, 2007), available at <http://www.freerepublic.com/focus/f-news/1880406/posts>. Another commentator in the Christian press explained: “The ideological chasm that increasingly divides the academic elite from the larger culture is in full view here. Many academics, by their own admission, look down upon Evangelical students, evangelical [sic] churches, and Evangelical citizens.” Audrey Barrick, *Survey Suggests University Faculty Bias Against Evangelicals*, GOSPEL HERALD (May 9, 2007), available at <http://www.gospelherald.net/Article/education/19767/survey-suggests-university-faculty-bias-toward-evangelicals.htm>. Insiders maintain that such bias does not manifest itself in the classroom. For instance, William Harvey, vice president of diversity and equity at the University of Virginia, commented that it might not be “fair to make the leap . . . that this is manifested in some bias in the classroom” and explained that when he was at the American Council on Education, he did not see any “serious” incidents in which a Christian student was subject to discrimination. See Cooperman, *supra*, at A3. Evangelicals, of course, would disagree. While this empirical work focuses on higher education, Wayne Jacobsen’s observations about his involvement in communities working through religion and sexuality issues underscore this phenomenon in secondary education. He explained that the communities where these issues explode most frequently are generally conservative communities that have become “bedroom” communities (or commuting suburbs) for larger urban areas; long entrenched conservatives suddenly feel like outsiders to the increasingly liberal and secular individuals settling in the community and view school administrators as hostile to religious ideals and worldviews. Jacobsen Interview, *supra* note 185.

Christianity.”²⁶⁴ Cause lawyers, then, might have significant reasons for eschewing what they perceive as parent- or school-driven governance in favor of rights protection by the judiciary.

c. Interest Representation

Having explored difficulties with process engagement, this section focuses on the prospect of sham process and the continued marginalization of outsider interests.

First, CAC enjoyed limited power to influence official decision makers. In responding to decisions of the school district’s curriculum committee and needing its proposed changes to be ratified by the school board, CAC entered the process in a position that was in some ways reactive and limited in its power to change predetermined positions. The participatory model might represent a mere rhetorical commitment to listen to the community members or might give these stakeholders some influence but no real decision-making power.²⁶⁵ That is, government bodies, like the Board of Education, may decide to cede no real power and instead maintain the option of ignoring decisions made at community-led meetings.²⁶⁶ Members of CAC, particularly CRC and PFOX representatives, might feel that the purported community representation embodied by the process was “purely nominal.”²⁶⁷

Next, CAC itself might have only nominally acknowledged outsider perspectives and might have been subject to capture by entrenched pro-gay interests in Montgomery County. As with the “governance feminism” phenomenon discussed in Part III.B., *supra*, a similar phenomenon might occur in the gay rights context. CAC produced a curriculum favored by pro-gay groups. While groups like PFLAG were included as stakeholders, important non-partisan stakeholders shared PFLAG’s commitments. For instance, PFOX noted that the CAC chair was a PFLAG donor.²⁶⁸ As PFOX argued to the Board of Education, this fact “lends even more credibility to [its] legal argument that the recommendations of the advisory committee were biased.”²⁶⁹

²⁶⁴ American Center for Law & Justice, Education, <http://www.aclj.org/Issues/Issue.aspx?ID=2> (last visited Jan. 20, 2009).

²⁶⁵ See Burris *et al.*, *supra* note 21, at 49 (community policing context).

²⁶⁶ See *id.* at 52 (participatory budgeting context).

²⁶⁷ *Id.* at 51.

²⁶⁸ See Griggs Letter, *supra* note 235, at 3.

²⁶⁹ *Id.* In addition, PFOX noted that the former CAC chair was now on the board of Metro DC PFLAG. See *id.* at 1.

Moreover, just as Halley and her co-authors notice the way feminism functions as expertise, curricular expertise in Montgomery County emerged from gay centrist NGOs like PFLAG and GLSEN.²⁷⁰ The gay interest groups had so firmly entrenched themselves that they had become impartial experts on curricular issues; gay-based advocacy had come to appear neutral. The official state position embodied a gay centrist orientation, making arguments by religious interests increasingly peripheral.

d. *Contesting Outcomes*

Finally, this section considers a potentially serious effect of New Governance process: with the guise of meaningful participation, such process may shield results from scrutiny and thereby legitimate existing power differentials. In this sense, the New Governance intervention may actually make lawyers' jobs more challenging as administrative bodies and courts conceptualize post-process litigation as contrary to democratic ideals.

This phenomenon played out in the Montgomery County litigation after the curriculum was revised. The revision process, which included CRC and PFOX, formed part of the basis for discrediting those same groups' objections to the outcomes. For example, in its opposition to CRC and PFOX's attempt to block field testing of the new curriculum, the Board of Education noted that two of the petitioners were in fact members of CAC and "actively participated in review" of the programming to which they now object.²⁷¹ Similarly, in denying CRC and PFOX's request for a stay, the state superintendent noted that a stay would frustrate the hard work by CAC, of which petitioners were a part.²⁷² Finally, the state circuit court, in affirming the state Board of Education's decision in favor of the school district, relied in part on the CAC process. The court credited what it saw as meaningful citizen participation and input from numerous medical experts who were

²⁷⁰ Compare Halley, *supra* note 169, at 340 (describing "the elaboration of feminist expertise about gender policy ranging from home economics to reproductive policy to educational reform, and . . . the formation of [NGOs] and special offices designated to the production and consumption of this expertise in policy and law settings across our legal landscape") (emphasis in original) with Turner Letter, *supra* note 238, at 4, 6 (objecting that some of the curricular materials, published by a major educational publisher, "are derived from GLSEN—a gay advocacy group that is not scientifically based," and objecting to the recommendation of PFLAG as an information resource).

²⁷¹ See generally Montgomery County Public Schools Opposition to Petitioners' Motion for Stay at 3 n.1, Citizens for a Responsible Curriculum v. Montgomery Cty. Pub. Schs. (Md. Cir. Ct. Jan. 31, 2008) (No. 284980).

²⁷² See Order of Superintendent, *supra* note 249, at 4.

also community members.²⁷³ The process itself, which perhaps only reinscribed existing power imbalances, contributed to the rationale for upholding the curriculum.

The appearance of community and expert consensus made the challengers appear undemocratic. In this sense, for Lambda Legal and other gay rights organizations, participatory process is not necessarily beneficial in and of itself but offers a mechanism for justifying curricular innovation on democratic principles in communities with institutionalized pro-gay thinking. For CRC and PFOX, the process only made contesting the results of entrenched decision makers more difficult. Therefore, the process used in Montgomery County (or advocated by the First Amendment Center) might merely produce the same result that would exist in its absence, and yet might render challenges to such results, whether through the courts or the political process, more difficult and seemingly less legitimate.

For gay rights advocates, the New Governance process allowed them to further entrench their position. But for Christian Right advocates, the process merely shrouded and legitimated their marginalization in the particular community. Therefore, for Christian Right advocates in Montgomery County, it might make more sense to contest the results of the school decision-making process in a public, third-party venue rather than through the channels of local school governance, which some conservative Christian parents might see as grounded in biased, incompatible views and assumptions.

C. The Opt-In Project and Law Firm Diversity

In her work on a structural approach to private employment discrimination, Susan Sturm celebrates the efforts of accounting giant Deloitte & Touche (Deloitte), which she sees as undertaking a privatized New Governance initiative responsive to judicially-created norms surrounding employment discrimination. The firm's Women's Initiative increased women's participation in the company, including their rates of promotion and leadership roles, by creating a task force that investigated reasons for gender disparities, addressed those disparities with concrete policy changes, and then reviewed the results of the policy on an ongoing basis. The entire process was imbued with a level of transparency so that

²⁷³ See *Citizens for a Responsible Curriculum v. Montgomery Cty. Pub. Schs.*, Case No. 284980 at 2–3, 9 (Md. Cir. Ct. Jan. 31, 2008) (explaining that CAC, consisting of experts and citizens, reviewed the lessons and recommended changes, many of which were adopted, and noting that medical experts residing in Montgomery County served as consultants during the process).

hiring and promotion patterns were made clear and benchmarks were met.²⁷⁴ Outside expert organizations advised Deloitte during the process.²⁷⁵ In just four years, the percentage of female partners rose from eight to twenty-one percent.²⁷⁶ The Women's Initiative at Deloitte represents a New Governance success story in which a private firm addressed a public problem in an innovative, flexible, and participatory way.

Legal scholars, gender advocates, and practitioners have increasingly turned their attention to law firm diversity, particularly the promotion of women. In law firms, the percentage of female associates stands at 44.1% while that of female partners is a mere 17.3%.²⁷⁷ Focusing on this issue tracks the private employment issues highlighted in the Deloitte example as well as the faculty issue Sturm tackles in her ADVANCE study. Sturm herself uses the issue of women at law firms as an example of second-generation discrimination ripe for New Governance intervention.²⁷⁸ Indeed, advocates working on women's representation and participation in large law firms have looked to Deloitte, as well as other private firms in non-legal industries, for examples of innovative solutions to gender diversity problems.

Public agencies, private firms, and NGOs have all played roles in addressing law firm diversity. First, the federal Equal Employment Opportunity Commission (EEOC) moved into the public intermediary role urged by Sturm. Choosing law firm diversity as an information-gathering opportunity, EEOC compiled and released a 2003 report detailing the strikingly low partnership rates for women and minorities at large law firms.²⁷⁹ Echoing Sturm's focus on second-generation discrimination, the report concluded that for "large, national law firms, the most pressing issues have probably shifted from hiring and initial access to problems concerning the terms and conditions of employment, especially promotion to partnership."²⁸⁰ The report explained that promotion to partnership "takes on

²⁷⁴ See Sturm, *A Structural Approach*, *supra* note 19, at 492.

²⁷⁵ *Id.* at 493, 499.

²⁷⁶ *Id.* at 498.

²⁷⁷ HELLER EHRMAN LLP, OPT-IN PROJECT, PROJECT REPORT 5 (May 31, 2007), available at <http://www.hellerehrman.com/docs/en/The%20Opt%20In%20Report.pdf> [hereinafter OPT-IN PROJECT REPORT]. Women make up only 5% of managing partners at large law firms. *Id.*

²⁷⁸ See Sturm, *A Structural Approach*, *supra* note 19, at 469–70.

²⁷⁹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIVERSITY IN LAW FIRMS 1 (2003), available at <http://www.eeoc.gov/stats/reports/diversitylaw/lawfirms.pdf> [hereinafter DIVERSITY IN LAW FIRMS].

²⁸⁰ *Id.* at 26.

special meaning for women and minorities since the decision is often viewed as being subjective and thus subject to non-relevant factors such as race/ethnicity or gender.”²⁸¹

Next, public intermediaries’ success depends on uptake and innovation by private firms. Heller Ehrman LLP (Heller), a now-dissolved international law firm, took the initiative on this end.²⁸² Heller maintained a Gender Diversity Committee, which pioneered the Opt-In Project (Opt-In), a program that addresses the retention and promotion of women in law firms.²⁸³ Heller was also part of the Bar Association of San Francisco’s No Glass Ceiling program, which sets benchmarks for firms regarding women in management and partnership positions.²⁸⁴ Through its initiatives, Heller might have been acting, in New Governance terms, as a private intermediary.²⁸⁵ Indeed, in its Opt-In work, Heller looked specifically to Deloitte for guidance and included the head of Deloitte’s Women’s Initiative in its deliberations.²⁸⁶ Heller relied on research from Catalyst, the same firm that advised Deloitte.²⁸⁷

Finally, NGOs provide information and advice to both public agencies and private firms. For instance, EEOC recently heard testimony from Professor Joan Williams of the Center for Work Life Law (WLL) at Hastings College of Law. Williams works with employers and employees to identify and eliminate family responsibilities discrimination, which she defines as “discrimination against employees based on their obligations to

²⁸¹ *Id.* at 27.

²⁸² While I am critical of Heller’s effort in this section, I acknowledge the firm’s willingness to act on the issue of diversity and recognize its initiative and progress compared to other large firms. Of course, other firms are also taking up gender diversity initiatives. In Chicago, for instance, the Bar Association’s Alliance for Women started a Call to Action initiative which uses the New Governance tool of benchmarking to achieve greater gender equality in law firms. Large Chicago law firms signed on, committing to increase the percentage of women partners and women in leadership positions and to implement equitable flex-time policies. See Jenner & Block, *Alliance for Women Urges Chicago Firms to Augment Leadership Roles for Women* (Jan. 26, 2005), http://www.jenner.com/news/news_item.asp?print=true&id=12858324 (last visited Jan. 20, 2009).

²⁸³ Heller Ehrman, *Diversity* (on file with author).

²⁸⁴ The Bar Ass’n of San Francisco, Diversity Program, No Glass Ceiling, http://www.sfbar.org/diversity/no_glass_ceiling.aspx (last visited Mar. 10, 2009).

²⁸⁵ See Sturm, *Conclusion to Responses*, *supra* note 123, at 422 (explaining that “the capacity to perform [the] intermediary role is not limited to public funding agencies and that it can be performed by very different kinds of public and private institutions”).

²⁸⁶ OPT-IN PROJECT REPORT, *supra* note 277, at 7.

²⁸⁷ See *id.* at 9, 11.

care for family members.”²⁸⁸ To address this issue, which Williams views as endemic in law firms, she urged EEOC to “involv[e] all of the stakeholders.”²⁸⁹

In addition, Williams worked with Heller, making the case that a law firm’s implementation of family-friendly policies can increase the number of women in the firm.²⁹⁰ Other NGOs, including the Feminist Majority Foundation and the Center of Leadership and Ethics, also advised Opt-In participants.²⁹¹

1. Principles

As with the previous examples, I will briefly set out five New Governance principles found in the response to the issue of women’s representation in law firms and specifically in Opt-In.

a. Facilitation by Public Agencies and NGOs

Sturm argues that EEOC should play a public intermediary role. The agency can collect data and facilitate studies on particular problems, create public dialogue about issues of discrimination, encourage private entities to create innovative solutions, and bring together stakeholders to share information and compare strategies.²⁹² Indeed, EEOC’s lack of formal enforcement power may provide an opportunity for the agency to fill a more facilitative role.²⁹³

In the law firm diversity context, EEOC has used the information gathered on EEO-1 forms to compile a comprehensive study of the

²⁸⁸ Statement of Joan C. Williams, Perspectives on Work/Family Balance and the Federal Equal Employment Opportunity Laws, Apr. 17, 2007, <http://www.eeoc.gov/abouteeoc/meetings/4-17-07/williams.html> (last visited Jan. 20, 2009) [hereinafter Williams Statement].

²⁸⁹ *Id.*

²⁹⁰ See *id.* at 6. Before WLL, Joan Williams had previously spearheaded a report by the Project for Attorney Retention (PAR), which was supported by the Sloan Foundation and the Washington, D.C. Women’s Bar Association. PAR attempted to compile best practices for law firms regarding non-stigmatizing alternative work policies and released a final report in 2001. See Project for Attorney Retention, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms* (2001), available at <http://www.pardc.org/Publications/BalancedHours2nd.pdf> [hereinafter *Balanced Hours*].

²⁹¹ See OPT-IN PROJECT REPORT, *supra* note 277, at 6, 10.

²⁹² See Sturm, *Workplace Equity*, *supra* note 23, at 295.

²⁹³ See Sturm, *A Structural Approach*, *supra* note 19, at 550.

representation and participation of women and minorities at large law firms.²⁹⁴ EEOC has also brought in outside experts, such as Joan Williams, to provide information and offer analysis, thereby opening up dialogue on this issue and encouraging firms to act on policy initiatives advocated by organizations like WLL.

NGOs, including expert organizations and quasi-public organizations, also take a leading role compiling data on the well-being of women and minorities in law firms and articulating problems relating to hiring, retention, and promotion.²⁹⁵

b. *Movement Outward to Private Firms*

Private firms are essential partners in addressing workplace bias. The organizations substantially responsible for the problem are trusted to engage in a collaborative process to uncover causes and address disparities. Opt-In is a paradigmatic example.

Public agencies and NGOs attempt to incentivize innovation by private firms, recognizing those that have produced results and sharing best practices.²⁹⁶ For example, EEOC started the Freedom to Compete Initiative in 2005, which it describes as “an outreach, education, and coalition-building strategy designed to complement the agency’s enforcement and

²⁹⁴ See *id.* at 551 (noting that employers submit EEO-1 reports regarding hiring and promotion patterns yet EEOC fails to analyze the data in a public, meaningful way).

²⁹⁵ For instance, the Equality Commission, a collaborative of the Massachusetts Bar Association, the Boston Bar Association, and the Women’s Bar Association, commissioned a study by the MIT Workplace Center on the career trajectories of men and women attorneys in large Massachusetts law firms. See Tricia Oliver, *Study Reveals Women’s Struggles to Make Partner*, LAW. J. (June 2007), available at <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2007/june/struggle-for-women-attorneys-to-make-partner>. The Equality Commission was spearheaded by Hon. Nancy Gertner, a federal district judge in Massachusetts. See *id.* The report concluded that “[w]omen leave the partnership track mainly due to the difficulty of combining law firm work and caring for children in a system that requires long hours under high pressure with little or inconsistent support for flexible work arrangements.” MIT WORKPLACE CENTER, WOMEN LAWYERS AND OBSTACLES TO LEADERSHIP 4 (Spring 2007), available at http://web.mit.edu/workplacecenter/docs/law-report_4-07.pdf. Indeed, lawyers on flexible or part-time schedules, most often for caretaking reasons, were less likely to be promoted to partnership than women not on such schedules. See *id.* at 4–5.

²⁹⁶ See, e.g., Lobel, *The Renew Deal*, *supra* note 9, at 381.

litigation programs.”²⁹⁷ To motivate firms to address glass ceiling issues and law firm diversity, EEOC gives out Freedom to Compete Awards to recognize “specific practices and concrete activities that produce results and reflect an abiding commitment to access and inclusion in the workplace.”²⁹⁸

c. *Stakeholder Collaboration*

Law firm employees are encouraged to participate in a collaborative process to explore and address gender and race disparities in law firm hiring, retention, and promotion. This most often takes the form of a committee or task force charged with assessing the problem and recommending solutions. Public agencies, expert organizations, and bar associations also play roles in the collaborative process.

d. *Movement Away from Isolated Legal Disputes and Toward Holistic Problem Solving to Address Second-Generation Bias*

The causes of current patterns of participation are attributed to institutionalized, often unnoticed, practices, rather than discriminatory policies. The focus is not on overt discrimination but on institutionalized bias, which is deemed less susceptible to rights-claiming litigation.²⁹⁹ By focusing on bias and culture, those addressing women’s under-participation in law firms reject portrayals of women as victims of intentional discrimination and resist placing blame specifically on firm management. All stakeholders are seen as having an interest in a better work environment that values and retains women attorneys.

Furthermore, specific patterns interact to form a more comprehensive picture of institutionalized bias.³⁰⁰ Unfavorable conditions for mothers relate

²⁹⁷ U.S. Equal Employment Opportunity Commission, *Facts About the Freedom to Compete Initiative*, at <http://www.eeoc.gov/initiatives/compete/index.html> (last visited July 3, 2008).

²⁹⁸ *Id.*

²⁹⁹ Indeed, as a woman partner at a large Washington, D.C. law firm remarked, “Law firms are way beyond discrimination—this is about advancement and retention. Problems with advancement and retention are grounded in biases, not discrimination.” See Timothy L. O’Brien, *Why Do So Few Women Reach the Top of Big Law Firms?*, N.Y. TIMES, Mar. 19, 2006. This, of course, seems overstated, but the point is well-taken.

³⁰⁰ New Governance thought in a variety of domains suggests the benefits of viewing problems in relationship to each other and as part of a larger picture. See, e.g., Karkkainen, *Information-Forcing Environmental Regulation*, *supra* note 48, at 888–89 (pointing to “integrated watershed management” to deal with an “entire suite of problems”).

more generally to bias against women and bias against those with families. Unreasonable work schedules disadvantage men just as they do women.³⁰¹ Subjective decisions affecting assignments, client development, and promotion result in the disparate treatment of both women and minorities.³⁰²

e. Transparency, Information Gathering, and Policy Revision

The first step toward acknowledging and addressing issues of underrepresentation in law firms requires openness from firms, the uniform collection of data, and the consistent collection and review of changing information.³⁰³ Opt-In materials are publicly available. Other firms can see how Heller addressed issues of gender diversity and the recommendations it made to deal with disparities. Firms are encouraged to share best practices. While firms must increase transparency to reveal patterns of hiring, retention, and promotion, public agencies and NGOs, including EEOC, state bar associations, research institutes, and advocacy organizations, undertake studies to compile and analyze the data. Continued analysis of new data allows for reflection on policy initiatives and revisions toward greater progress.

2. Professional and Representational Challenges

a. Framing (Legal) Problems

This section explores the way in which public and private actors working on law firm diversity situate the issue as an institutional or cultural problem, rather than as a law-based discrimination issue. The impulses toward holistic assessments and privatized, organizational solutions obscure points for more law-centered interventions.

First, those working on the issue of law firm diversity resist a specifically gender-based framing of the situation, instead casting a wider

³⁰¹ In her Deloitte example, Sturm notes how the “problem-solving process created an immediate and direct focus for women’s (and men’s) concerns, which provided incentives for collective action.” Sturm, *A Structural Approach*, *supra* note 19, at 499.

³⁰² See Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 184 (explaining that in New Governance practice “problems have a tendency to expand”); see also Lobel, *The Renew Deal*, *supra* note 9, at 385–86.

³⁰³ See Simon, *Solving Problems vs. Claiming Rights*, *supra* note 11, at 192 (“an important role of background institutions is both to develop metrics to facilitate the comparison of data across institutions and to create incentives for these institutions to make information available”).

net to frame the issue as a law firm employee problem regardless of gender. For instance, Joan Williams states that “over 70 percent of men in their twenties and thirties (in contrast to only 26 percent of men over 65) said, in one study, that they would be willing to take lower salaries in exchange for more family time.”³⁰⁴ The tension in this balancing act is palpable; Williams argues that “[m]ost women lawyers become mothers at some point in their careers, and given that women are still responsible for a disproportionate amount of the caregiving in our society, a firm that wants to attract and retain women must address the needs of mothers – and fathers.”³⁰⁵ Similarly, Opt-In constructs a picture in which both women and men would benefit from restructuring the workplace in ways that recognize work/life balance issues.³⁰⁶

Next, advocates privatize the problem, appealing to market-based incentives and firm-based solutions rather than to equality-based rationales and public law-based solutions. Williams, for instance, appeals to law firms’ financial sense as much as to their sense of gender-based justice, making the case that better work-family policies will help firms’ bottom lines by avoiding the costs of attrition.³⁰⁷ Solutions are located within the walls of the law firm as Opt-In relies on the efforts of law firm insiders. While outside experts frame issues and provide recommendations, authority for implementing solutions rests solely with the law firm itself, rather than with NGOs, courts, or public agencies.

These framing techniques may obscure much of the actual problem. An issue that might be viewed as gender discrimination and a public law problem is instead characterized as a private workplace culture issue.³⁰⁸

³⁰⁴ OPT-IN PROJECT REPORT, *supra* note 277, at 9.

³⁰⁵ *Balanced Hours*, *supra* note 290, at 9.

³⁰⁶ See OPT-IN PROJECT REPORT, *supra* note 277, at 4.

³⁰⁷ See *id.* at 7.

³⁰⁸ See Lauren B. Edelman, Howard S. Erlanger, & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 519 (1993) (“[I]nsofar as discrimination complaints stem from illegal discrimination, the redefinition of legal issues in organizational terms tends to draw attention away both from violations of law and from the class basis of discrimination. Recasting legal issues in organizational terms deemphasizes and depoliticizes workplace discrimination.”); cf. Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculation on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 967 (1999) (“disputes that originate as rights violations . . . are likely to be handled as interpersonal difficulties, administrative problems, or psychological pathologies”).

Gender equity advocates and legal mandates appear largely irrelevant, and cause lawyers from women's rights organizations are absent.³⁰⁹

b. *Missed Rights-Claiming Opportunities*

The non-legal framing mechanisms highlighted in the previous section obscure potentially productive rights-claiming opportunities, which this section addresses. New Governance problem solving to address certain issues may be premature. The holistic lens of New Governance, which attempts to aggregate various forms of discrimination and bias, includes within its reach specific instances of explicit discrimination that might be more effectively managed through straightforward rights claiming. Unequal pay and maternal wall discrimination may fit well with a rights-claiming, state-centered regulatory model of public interest advocacy, but instead these issues are sacrificed to privatized solutions.

First, some firms pay part-time associates, who tend to be women, a salary less than the proportionate amount of full-time salary, citing overhead in most situations. NGOs working on this issue tell law firms that such practices may provoke an Equal Pay Act (EPA) suit.³¹⁰ For instance, in presenting as part of Opt-In programming, Joan Williams and her colleague, Linda Marks, pointed to potential legal claims under the Equal Pay Act and Title VII. Williams noted that some firms expect part-time associates to work 80% of a full-time schedule yet get paid only 65% of a full-time salary.³¹¹ Although Williams and Marks cite *Lovell v. BBNT Solutions*,³¹² in which a federal district court held that paying a woman chemist who worked 75% of a full-time schedule an effective pay rate lower than a male chemist working a full-time schedule violated the EPA,³¹³ the EPA assertion in the law firm context lacks clear legal mandates on its side. Most courts have

³⁰⁹ Cf. Edelman & Suchman, *supra* note 308, at 970 ("The purported social benefits of the in-house counsel movement center on legal professionals gaining access to the corporate decisionmaking process, but giving lawyers more access does not necessarily guarantee that they will use that access to promote external legal values. Thus, even the apparently legalizing effects of in-house counsel offices may prove to be illusory: preventive programs may produce compliance with the letter of the law while largely vitiating the law's spirit[.]").

³¹⁰ OPT-IN PROJECT REPORT, *supra* note 277, at 21.

³¹¹ JOAN WILLIAMS & LINDA MARKS, SOLVING THE PART-TIME PUZZLE (2006), available at http://www.hellerehrman.com/docs/en/Opt-In_Project_HE_Powerpoint.ppt [hereinafter SOLVING THE PART-TIME PUZZLE].

³¹² 299 F. Supp. 2d 612 (E.D. Va. 2004); 295 F. Supp. 2d 611 (E.D. Va. 2003).

³¹³ SOLVING THE PART-TIME PUZZLE, *supra* note 311.

rejected claims by professional women, including lawyers, under the EPA.³¹⁴ Instead, courts have allowed employers broad discretion when professional or managerial positions are involved.³¹⁵ Accordingly, the legal threat leveled by advocates in this context is fairly empty in the current legal landscape. Perhaps efforts at legislative reform to explicitly expand EPA coverage or litigation urging courts to understand professional and managerial positions within the EPA rubric offer more effective ways to help women receiving pay that is less than proportional.³¹⁶

Next, discrimination against women based on their status as mothers is often explicit and straightforward, rather than taking a more subtle form of bias that hinders women's professional advancement.³¹⁷ As Williams argued to EEOC, "[i]t is 1970s style discrimination in the new millennium."³¹⁸ In a variety of employment settings, courts have found discrimination under a number of statutes, including Title VII, the Americans with Disabilities Act (ADA), the EPA, and the Family and Medical Leave Act (FMLA).³¹⁹ As Williams notes, "there is a sharply higher success rate in [family responsibilities discrimination] cases than in other types of employment

³¹⁴ See, e.g., *Todd v. Blue Ridge Legal Servs.*, 175 F. Supp. 2d 857 (W.D. Va. 2001) (lawyer); *Arthur v. Coll. of St. Benedict*, 174 F. Supp. 2d 968 (D. Minn. 2001) (professor); *Campana v. City of Greenfield*, 164 F. Supp. 2d 1078 (E.D. Wis. 2001) (city treasurer). See also Juliene James, *The Equal Pay Act in the Courts: A De Facto White-Collar Exemption*, 79 N.Y.U. L. REV. 1873, 1873 (2004) (showing that "plaintiffs bringing Equal Pay Act claims have faced courts whose interpretation of the law has effectively excluded women in higher level positions").

³¹⁵ See, e.g., *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989) (in denying claim of female employee in hybrid customer service representative/insurance agent position, the court explained that the EPA "permit[s] employers wide discretion in evaluating work for pay purposes"); *Campana*, 164 F. Supp. 2d at 1090 (finding that city treasurer and comptroller were comparable, "counterpart" positions but not "substantially equal" for purposes of EPA claim); see also James, *supra* note 314, at 1886–89 (discussing relevant case law).

³¹⁶ Recently, Congress has shown its willingness to pass equal pay reform, approving legislation that overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 620, 127 S. Ct. 2162, 2165 (2007) (holding that female employee did not meet filing deadline for Title VII claim because the 180-day period started when she first received her paycheck, even though she was unaware of the discrimination at the time). See also Editorial, *Progress on Fair Pay*, N.Y. TIMES, Jan. 28, 2009, at A30.

³¹⁷ Williams Statement, *supra* note 288, at 3.

³¹⁸ *Id.* at 4.

³¹⁹ *Id.* at 7.

discrimination cases.”³²⁰ Lawsuits might move the ball forward, compelling action by law firms seeking to avoid litigation and publicity. Research shows that discrimination lawsuits may spur anti-discrimination efforts by the firm subject to suit as well as other firms in the industry.³²¹ Grouping this issue with other law firm diversity issues obscures the presence of straightforward discrimination and the potential for judicial remedies.

Sex discrimination complaints against law firms, then, might offer powerful tools for change. Indeed, a sex discrimination charge against the prestigious law firm of Boies, Schiller, & Flexner resulted in a favorable determination by EEOC and a settlement.³²² Two associates claimed that the firm created a two-tier system that pushed women into a non-partnership track, and thereby discriminated against women with respect to compensation and the terms of employment.³²³ EEOC determined that this practice, which goes to the heart of much of the treatment that Williams documents and the institutionalized bias that Opt-In seeks to address, constituted sex discrimination under Title VII.³²⁴ The outcome suggests the administrative system’s tolerance for such claims and points to ways in which rights-claiming advocacy may become a mechanism for change in the domain of law firm diversity.

I am not arguing here that litigation and New Governance problem solving are necessarily mutually exclusive such that advocates must choose one or the other. Instead, I am pointing out how as New Governance occupies the space of law firm diversity rhetorically and with hard resources, it renders litigation options peripheral. Indeed, as scholars situate New Governance as a paradigm shift, the effectiveness and desirability of rights-claiming litigation is called into question, and an all-or-nothing contest is constructed. Instead, noticing the issues of straightforward discrimination against women in the law firm setting and the potential for successful litigation highlights the way in which New Governance should be framed as a contingent model of cause lawyering that complements, rather than displaces, other public interest law models.

³²⁰ *Id.*

³²¹ Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J. L. & GENDER 279, 288, 295 (2007).

³²² Determination, *Baird, Porter v. Boies, Schiller, & Flexner LLP* (EEOC 2003) (Nos. 160-A1-1374, 160-A1-1375) (on file with author).

³²³ *See id.* at 1.

³²⁴ *Id.*

c. *Nominal Participation*

This section turns away from missed law-centered opportunities and toward the New Governance process itself, exploring the actual authority granted to the relevant stakeholder organizations.

According to Sturm's description and publicly available information, Deloitte's gender diversity program lacked mechanisms that gave the task force decision-making authority or made its recommendations binding. Instead, management, which Sturm describes as "initially skeptical," had to take the issue and recommendations seriously and commit to enacting policy changes in accordance with the findings of the committee.³²⁵ But we must not gloss over this crucial step. What happens when a firm's management committee fails to take seriously the findings of a diversity task force?

Heller's Gender Diversity Committee produced lengthy reports and recommendations detailing the issues of women's low rates of retention and promotion in Heller and other large law firms. Rather than vesting authority in the Committee, though, Heller understood the Committee's role as "provid[ing] input to management on best practices in these areas."³²⁶ For instance, Opt-In's recommendations were positioned as questions rather than assertions, appearing under the heading, "Should Law Firms Consider[?]."³²⁷ Here, the framers contemplated policies as expansive as flexible schedules without identification of reasons and the provision of on-site childcare, as well as changes as minor as the maintenance of bar memberships for attorneys who have left the firm and the provision of telephones that roll over to home or mobile lines.³²⁸

Opt-In did not have a mechanism that granted the Gender Diversity Committee or Opt-In participants decision-making authority. Instead, even after devoting substantial resources toward facilitating roundtables and task forces that brought together law firm insiders, outside experts, and those from other industries, Heller carefully framed the results as merely "ideas" rather than mandates.³²⁹ Indeed, Heller went so far as to explain that the

³²⁵ Sturm, *A Structural Approach*, *supra* note 19, at 494, 492–96.

³²⁶ Heller Ehrman, *Diversity*, *supra* note 283.

³²⁷ OPT-IN PROJECT REPORT, *supra* note 277, at 16.

³²⁸ *See id.* at 21, 23, 24.

³²⁹ *See* Bagenstos, *supra* note 80, at 29 ("[M]anagement lawyers and consultants have frequently urged employers to adopt internal dispute resolution procedures, zero-tolerance policies, and diversity and sexual harassment training programs. These responses serve the interests of employers by making them appear to be invested in achieving workplace equality, and perhaps by promoting happier interpersonal relations among workers. They also serve the interests of the intermediaries themselves, by

policy recommendations generated “are not endorsed by any law firm, including Heller Ehrman.”³³⁰ Citing “client demands, market forces, and socioeconomic influences,” Heller noted that “some of these ideas [would be] harder than others to put into practice in the near term (or ever).”³³¹

Seemingly aware of its lack of authority, much of the guidance provided to women at Heller by the Gender Diversity Committee lacked bite. For instance, in its guide for women attorneys, *Sharing What We Know*, the rhetoric seemed more fitted to rationalizing the current state of policies than to thinking critically about moving forward. Women partners urged women associates to benefit from their “humor and insight” rather than from binding policies that speak to women’s retention and promotion.³³²

Unsurprisingly, then, Heller did not approach the indicators of success Sturm observed in her Deloitte and ADVANCE case studies. The percentage of women partners increased only marginally: In Heller’s self-reported numbers taken from snapshots each year, the percentage of women partners increased from just above 19% on February 1, 2006 to just below 23% on February 1, 2008.³³³ Significantly, during this time frame, Heller experienced a one-person *decrease* in the actual number of women partners, which fell from fifty-four to fifty-three.³³⁴ A report released by *Working Mother* and

promoting a market for their own services. But there is scant evidence that the responses urged by intermediaries actually result in equal treatment or unbiased decisionmaking.”).

³³⁰ OPT-IN PROJECT REPORT, *supra* note 277, at 14.

³³¹ *Id.*

³³² HELLER EHRMAN LLP, *SHARING WHAT WE KNOW: A RESOURCE FOR AND BY HELLER EHRMAN WOMEN 1* (2005) available at http://www.hellerehrman.com/docs/en/Sharing_What_We_Know.pdf (“This exercise made us truly proud to be a part of Heller Ehrman and we hope you benefit as we did from the humor and insight of the women of Heller Ehrman.”).

³³³ To make these calculations, I used numbers provided by Heller to the National Association for Law Placement (NALP), which publishes them in the NALP Directory of Legal Employers. NATIONAL ASSOCIATION FOR LAW PLACEMENT, NALP DIRECTORY OF LEGAL EMPLOYERS 133, 201, 268, 306, 508, 1167, 1695, 1730 (2008) [hereinafter 2008 NALP DIRECTORY]; NATIONAL ASSOCIATION FOR LAW PLACEMENT, NALP DIRECTORY OF LEGAL EMPLOYERS 133, 192, 254, 291, 488, 1140, 1652, 1678 (2007) [hereinafter 2007 NALP DIRECTORY]; NATIONAL ASSOCIATION FOR LAW PLACEMENT, NALP DIRECTORY OF LEGAL EMPLOYERS 128, 190, 250, 286, 477, 1107, 1614, 1642 (2006) [hereinafter 2006 NALP DIRECTORY]. After adding up the number of women partners and women associates in all Heller domestic offices, I divided those numbers by the total number of partners and associates, respectively, in those offices.

³³⁴ Heller had fifty-four women partners as of February 1, 2006, fifty-five women partners as of February 1, 2007, and fifty-three women partners as of February 1, 2008. See 2008 NALP DIRECTORY, *supra* note 333, at 133, 201, 268, 306, 508, 1167, 1695, 1730; 2007 NALP DIRECTORY, *supra* note 333, at 133, 192, 254, 291, 488, 1140, 1652,

Flex-Time Lawyers in late 2007 generally confirmed this result, revealing that women made up only 20% of partners at Heller.³³⁵ Furthermore, Heller fared poorly in its retention of women associates: While the total number of associates increased from 298 to 305, the number of women associates decreased from 144 to 130.³³⁶ Heller's numbers compare poorly to Deloitte, which boasted a 13% increase in women partners in four years, and an increase in the actual number of women partners from 88 in 1993 to 246 in 1999.³³⁷ In addition, Deloitte's attrition rates decreased significantly from 1995 to 1998.³³⁸

Heller dissolved in the fall of 2008 after the defection of key partners prompted banks to call the firm's debt.³³⁹ Signs of trouble appeared earlier in 2008, however, when reports suggested that new management had changed the culture to a more business-driven model that moved away from rewarding employees for good citizenship and quality work and toward rewarding them for bringing in business.³⁴⁰ In the wake of its dissolution, many Heller partners dispersed to other firms.³⁴¹ One such partner, an Opt-In supporter, directly linked the business-driven direction of Heller to the firm's demise. She saw Opt-In as a way to provide the psychological basis necessary to unite such a large group of lawyers, lamenting the fact that firms, including Heller, "focus[] a lot of attention on profits per partner" when in fact "[p]eople are held together more by culture than by money."³⁴²

1678; 2006 NALP DIRECTORY, *supra* note 333, at 128, 190, 250, 286, 477, 1107, 1614, 1642. It is worth noting that Heller maintained the same number of U.S. offices (eight) as it experienced a decrease in the number of women partners.

³³⁵ See Suzanne Riss, Teresa Palagano, & Angela Ebron, *Best Law Firms for Women*, WORKING MOTHER 67, 69 (2007), available at <http://www.workingmother.com/?service=vpage/797> (follow "Heller Ehrman LLP" hyperlink).

³³⁶ See 2008 NALP DIRECTORY, *supra* note 333, at 133, 201, 268, 306, 508, 1167, 1695, 1730; 2007 NALP Directory, *supra* note 333, at 133, 192, 254, 291, 488, 1140, 1652, 1678; 2006 NALP DIRECTORY, *supra* note 333, at 128, 190, 250, 286, 477, 1107, 1614, 1642.

³³⁷ Sturm, *A Structural Approach*, *supra* note 19, at 498. Sturm observed similarly striking progress in her ADVANCE case study discussed in Part II.C., *supra*.

³³⁸ Sturm, *A Structural Approach*, *supra* note 19, at 498.

³³⁹ Baz Hiralal, *118-Year-Old Heller Ehrman Dissolves, Employees Left Searching*, THE DEAL.COM, Oct. 9, 2008, http://www.thedeal.com/dealscape/2008/10/118yearold_heller_ehrman_disso.php.

³⁴⁰ Drew Combs, *Stop-Loss*, AMERICAN LAWYER, May 5, 2008, at 142, 147.

³⁴¹ Hiralal, *supra* note 339.

³⁴² Tom Abate, *Woes that felled S.F. law firms shake industry*, S.F. CHRON., Nov. 1, 2008, at A1.

d. *Interest Representation*

Finally, this section shows how the interests most affected by the New Governance intervention may lack real power or meaningful representation. The issue of law firm diversity, and the representation of women more specifically, casts private lawyers themselves as stakeholders. In this sense, lawyers function as directly affected interests rather than as representatives, experts, or advocates. Opt-In, for instance, relied on an internal stakeholder collaboration to identify and redress problems affecting women lawyers.³⁴³

However, the process itself made women's own representation of their interests exceedingly difficult. How can women associates, who might aspire to career success at the firm, strongly advocate their positions to those who determine their futures?³⁴⁴ Indeed, the women most wanting a career at the firm are likely those most invested in the reform process, yet also most constrained.

Sturm argues that in the Deloitte context, the group action of women, as facilitated through the Women's Initiative, allowed women to voice complaints that they would not otherwise feel comfortable voicing as individual actors.³⁴⁵ But with relatively low numbers of women at some of the nation's most prestigious law firms, and a paucity of women partners as potentially sympathetic powerbrokers, the idea of group action might not solve the problem in this new context.³⁴⁶ Women associates might realistically worry that adverse action may result from their insistence on more favorable policies. Without stature and power, women associates might need outside advocates to serve their interests.

Not only might the women most affected by the firm's policies be hindered in their ability to advocate on their own behalf, but the most

³⁴³ OPT-IN PROJECT REPORT, *supra* note 277, at 4.

³⁴⁴ See Edelman, Erlanger, & Lande, *supra* note 308, at 507 ("Given the formal inequality of employers (or managers) and employees, and the fact that employees who have discrimination complaints often fear retaliation, employees may have difficulty being strong advocates on their own behalf.").

³⁴⁵ See Sturm, *A Structural Approach*, *supra* note 19, at 499 ("Women developed an internal (and external) presence and a vehicle for expressing their concerns as a group. This enabled women who were reluctant to raise concerns individually to participate without creating an adversarial relationship with the firm or risking their personal position.").

³⁴⁶ Here we might think of women partners as somewhat analogous to in-house counsel—they are lawyers for the organization. In this sense, they might be more likely "to adopt distinctly managerial orientations, entrepreneurially seeking to 'add value' to the organization's bottom line" rather than "engaging in the internal equivalent of 'cause lawyering.'" Edelman & Suchman, *supra* note 308, at 982.

marginalized women associates may be left out entirely. Minority women make up only one percent of equity partners at the nation's law firms.³⁴⁷ We cannot necessarily expect white women to understand or account for the situation of minority women. Those women who have "made it" might have little incentive and limited ability to consider those who have not. As Lani Guinier and Martha Minow remark in response to Sturm's ADVANCE case study, "partial inclusion means that diversity programs may open the door selectively—and the most privileged of the excluded group, those least likely to disrupt the framework, may be the most likely to come in."³⁴⁸ White women partners may help bring more white women associates along while minority women continue to experience the results of race and gender bias. And just as with the CAC process in Montgomery County, a collaborative process with laudable aims and some indicators of success may make minority women's ability to contest the institutional culture even more difficult.

Furthermore, for minority women at law firms, the move to second-generation discrimination may be premature. The ABA Commission on Women found that nearly half of minority women reported frequent and blatant racism in the workplace.³⁴⁹ In its attempt to be holistic, then, New Governance theory may lose the specificity of experience and fallback on essentialized notions of gender.³⁵⁰ While the turn away from court-centered strategies *may* make sense for white women, it may forsake opportunities to advocate on behalf of and improve the conditions of employment for women of color.

V. CONCLUSION

Perhaps because Susan Sturm herself is charting new territory by bringing New Governance to an identity-based, anti-discrimination context, she recognizes that given the "regulatory ambitiousness" of New

³⁴⁷ See Kimberly Atkins, *Women and minorities struggle to advance in top law firms*, DAILY RECORD, Apr. 24, 2007 (relying on studies by the National Association of Women Lawyers and The Vault).

³⁴⁸ Lani Guinier & Martha Minow, *Preface to Responses: Dynamism, Not Just Diversity*, 30 HARV. J. L. & GENDER 269, 275. Carle, *supra* note 139, at 337 ("In the case [of] ADVANCE, for example, should the relatively few women who have 'made it' within existing institutional configurations speak for those who have not?").

³⁴⁹ Jill Schachner Chanen, *Early Exits*, ABA J., Aug. 2006, at 33, 37.

³⁵⁰ See Guinier & Minow, *supra* note 348, at 275 (noting in response to Sturm's ADVANCE case study that "[p]ersistent failure to address women of color reflects in no small measure the defects in categorical thinking").

Governance, those in the movement must “address head-on the consequences of requiring new governance methods where those conditions do not currently exist.”³⁵¹ By exploring examples implicating identity-based issues, this Article attempts to illuminate those conditions, and in doing so, to pull back on the totalizing, enthusiastic embrace of New Governance strategies. My purpose is not to dismiss New Governance or to suggest its resonance only when litigation fails, but to recognize its contextuality and to reframe it as a contingent model of cause lawyering. In doing so, I hope to have shown that New Governance success depends heavily on the relationships among the parties involved, the substantive issues at stake, and the role of law and lawyers both inside and outside the New Governance regime. At the same time, exposing instances of New Governance failure attests to the continued viability of rights-claiming techniques as a way to advance substantive equality for marginalized groups and individuals.

³⁵¹ Sturm, *Gender Equity Regimes*, *supra* note 11, at 324.

